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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SPAWR OPTICAL RESEARCH, INC.
WALTER J. SPAWR, AND
FRANCES SPAWR,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the criminal penalty provision of the Export Administration Act (EAA) does not explicitly define the elements of the crime of unlawful export, *i.e.*, whether the commodity had in fact been listed on the Commodity Control List (CCL) and therefore required a validated license before it could lawfully be exported, may such element be conclusively presumed or must it be proved by the prosecution in a jury trial; and

When the criminal penalty provision of the EAA had been interpreted by the First, Second and Eighth Circuits to require the prosecution to prove that the commodity had in fact been listed on the CCL before the export without license occurred; and

When the Chairs of the Congressional Committee and Subcommittee having jurisdiction over the EAA, in the course of deliberations on the reauthorization of the EAA, recognizing that the conflict between the circuits offended Congress' overriding public policy concern that any statute regulating the foreign commerce of the United States be uniformly enforced, explicitly affirmed the validity of the interpretation of the EAA by the First, Second and Eighth Circuit Courts of Appeal; and

When the aforementioned Chairs of the Congressional Committee and Subcommittee having jurisdiction over the EAA, in order to bring about uniform enforcement of a statute regulating foreign commerce of the United States, called upon the Ninth Circuit to reconsider its erroneous interpretation of the EAA; and

When the Court of Appeals for the Ninth Circuit categorically refused to reconsider its misinterpretation of the EAA;

Whether under all the foregoing circumstances the Supreme Court should grant certiorari to: (1) assure comity between the Congress and the judiciary in their interpretation

of the EAA; and (2) to assure that the regulation of foreign commerce under the EAA be uniformly enforced by the United States Government.

PARTIES TO THE PROCEEDINGS

The petitioners, named in the caption, were defendants and appellants below. Walter J. Spawr and Frances Spawr are individuals who are husband and wife. Spawr Optical Research, Inc., is a closely held corporation, wholly owned by the Spawr family. The appellee below, respondent in this Court, is the United States of America.

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United States v. *Spawr Optical Research, Inc.*, 864 F.2d 1467 (9th Cir. 1988), *cert. denied*, 493 U.S 809, *reh'g denied*, 493 U.S. 1022 (1989) . . . . . *passim*

STATUTE

Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969), *as amended by* Pub. L. No. 92-412, 86 Stat. 644 (1972) and Pub. L. No. 93-500, 88 Stat. 1553 (1974) (current version at 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. IV. 1986)) . . . . . *passim*

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Brief of the Optical Society of America, Inc. and the Society of Photo-Optical Instrumentation Engineers as *Amici Curiae* at 15, *United States* v. *Spawr Optical Research, Inc.*, 864 F.2d 1467 (9th Cir. 1988) (No. 88-1708), *cert. denied*, 493 U.S. 809, *reh'g denied*, 493 U.S. 1022 (1989) 19

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Spawr Optical Research, Inc., Walter J. Spawr and Frances Spawr respectfully pray that a writ of *certiorari* issue to review the judgment of the Court of Appeals entered in this case on January 8, 1993.

OPINIONS BELOW

The order denying Petitioner's Motion to Reinstate is unreported and is annexed hereto as Appendix A. The majority and dissenting opinions of the court of appeals are reported at 864 F.2d 1467 (9th Cir. 1988), *cert. denied*, 493 U.S. 809, *reh'g denied*, 493 U.S. 984 (1989), and are annexed hereto as Appendix B. The district court opinion is unreported and is annexed hereto as Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1993. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

In Appendices E and F, there are, respectively set forth in pertinent part, the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969), *as amended by* Pub. L. Stat. 1553 (1974) (current version at 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. IV 1986)), and provisions of the Code of Federal Regulations pertaining thereto.

STATEMENT

This case originally concerned an order of the district court, affirmed by a divided panel of the court of appeals, that if allowed to stand would, *inter alia*, effectively preclude trial by jury in Federal district courts in the Ninth Circuit in criminal prosecutions brought under the Export Administration Act (EAA) for exporting commodities without a validated license.

Under this decision, whenever an United States Prosecutor alleges that a commodity is in fact on the Commodity Control List (CCL), and thereby requires an export license, the trier of fact must accept this determination as final. The prosecution is relieved of proving as an element of the crime that the commodity was listed on the CCL and therefore required a valid license before export. Intentional export without a license would automatically be a crime because the accused would not be allowed to present as a defense the fact the commodity was not on the CCL at the time of export and therefore did not require an export license. Under the EAA as thus interpreted, the Secretary of Commerce -- not the judge nor the jury -- would have the power under this decision to determine guilt in a criminal

proceeding and the guilt-determinative element of the crime would be final and unreviewable.

At the trial, petitioners stipulated that they had exported the optical laser mirrors and that petitioners did not have a validated export license. The sole disputed issue was whether the optical laser mirrors exported by petitioners had been listed on the CCL by the Secretary, and therefore required a validated export license before they could lawfully be exported. This issue was guilt-determinative. If the optical laser mirrors had been listed on the CCL, the export without a license constituted a violation of the Act. If the optical laser mirrors had not been listed, there is no dispute that they could be freely exported without a license, that no crime was committed, and petitioners were wrongfully convicted.

There is no dispute that at trial the judge read voluminous instructions to the jury and submitted this disputed question of fact, whether the mirrors had been listed on the CCL, to the jury. When, however, petitioners in the section 2255 proceeding adduced proof that the prosecution had, *inter alia*, suppressed evidence that the mirrors had not been listed on the CCL, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that the prosecutor had, in order to establish that the mirrors were in fact listed on the CCL, also knowingly provided the judge and jury with a bogus list instead of the authentic CCL,[1] the district court found that petitioners were not materially prejudiced by this suppression of evidence and prosecutorial misconduct because the issue of whether the Spawrs' optical laser mirrors were included on the CCL was not a triable issue and "[t]he issue is not

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[1] The bogus list was "Interpretation 29," a document published by the Department of Commerce which comprises the list of commodities which may not be exported to Cuba, Cambodia, Libya, North Korea and North Vietnam. (App. 40a). By its terms, the listed commodities may be freely exported to any other country in the world without a license. The prejudice resulted because "Interpretation 29" listed "optical elements and appliances," which misled both judge and jury.

one which goes to the jury". (App. 25a). For the same reason, the court found that petitioners were not materially prejudiced by the failure of their trial counsel to conduct any discovery, to depose any witnesses, to request any documents, to propound any interrogatories or, with one exception, even to interview possible defense witnesses.

After review *de novo*, a divided panel of the court of appeals affirmed on the ground that the petitioners had failed to show that the suppression of exculpatory evidence and the prosecutorial misconduct were material to the outcome of the trial and had been prejudicial. This judgment rests on a series of imbricated reasons arising from the majority's interpretation of the so-called "finality clause" of the EAA, in force at the time of the export in question which precludes judicial review of certain functions exercised and certain orders issued by the Secretary under the EAA. Section 2407 proclaims that "functions exercised under this Act are excluded from the operation of" those sections of the Administrative Procedure Act (APA) that guarantee judicial review for persons "adversely affected or aggrieved by agency actions." This provision clearly precludes judicial review of the *appropriateness* of an order by the Secretary, which list a commodity on the CCL. This provision was enacted, according to the majority, to prevent "judicial factfinding on intricate licensing questions" because it would "undermine the Secretary's authority if judges and juries in individual criminal proceedings were permitted to reverse licensing determinations." (App. 12a). The majority interpreted this preclusion of judicial review with respect to administrative determinations as to the *appropriateness* of listing goods on the CCL, as also precluding judges and juries from determining in criminal proceedings the issue of *whether a commodity had, in fact, been listed on the CCL*, a finding that in turn automatically determines whether a license is legally required.

The court, blurring the distinction between *whether*

a commodity *should* be listed and whether it in fact *had* been listed, concluded that "when the Secretary has issued a license or order, the factfinder is instructe(App. 13a). This law, without considering its advisability." (the Secretary in supersession of the judge and jury by tcording to the individual criminal prosecutions is, ace trial court must majority, *absolute* - "[r]ight or wrong, thea matter of law", accept [the Secretary's] determination as aependently at trial and "the government need not establish inde were included on . . . that the Spawr's optical laser mirrors ing requirement." the CCL and therefore subject to the licensill the government (*Id.*) The mere act of intentional export is al obtain conviction needed to prove, according to the court, to
of petitioners. (*Id.*). that he could not

Judge Pregerson dissented. He said provided the basis agree with the statutory interpretation that psions [that exempt for the majority's decision -- "These provisiy action under the the Secretary from judicial review of agency support for the Administrative Procedure Act] offer no l the factfinder is majority's position that in a criminal trialommodity was in precluded from determining whether a co alleged criminal fact listed on the CCL at the time of the
violation." (App. 15a). the majority had

Judge Pregerson also noted that *ther*, 560 F. Supp. misconstrued *United States* v. *Moller-Butch*ir. 1983), which, 550 (D. Mass.), *aff'd* 723 F.2d 189 (1st Cstinction between if read correctly, "makes clear the disetary actually did judicial review of (1) whether the Secretion of fact -- and place a commodity on the CCL -- a questiced a commodity (2) whether the Secretary should have plaApp. 15a).
on the list -- a question of advisability." (at "the majority's

Finally, Judge Pregerson noted thom constitutional reading of the Act also suffers froal infirmities that infirmities." (App. 16a). The constitution abridgement of Judge Pregerson noted include the e process and the petitioners' "Fifth Amendment right to du

Sixth Amendment guarantee of a criminal defendant's right to trial by jury [which] require[s] not only that the [illegible] reasonable doubt, but also that each element be submitted to an impartial trier of fact." (*Id.*). Judge Pregerson concluded:

> Whether the laser mirrors exported by the Spawrs were in fact on the CCL at the time they were exported is an essential element of the offenses allegedly committed by them. It was for the jury, not the Secretary of Commerce, to determine whether the Spawrs' laser mirrors were in fact an item listed on the CCL.

(App. 17a).

Moreover, the majority completely ignored and made no reference to petitioner's further showing that the prosecution, with the connivance of the chief prosecution witness, suppressed an official document of the Department of Commerce in which the Secretary, through the Office of Export Administration, had made an explicit finding prior to the export in question that the optical laser mirrors at issue had "an appropriate non-strategic end-use" and that they were freely available abroad, *i.e.*, a finding of "non-COCOM foreign availability." (App. 44a). The official Department of Commerce document explicitly found that "comparable laser mirrors are available from Mirror Techneque of Switzerland, a division of Laser Techneque of Switzerland." (*Id.*)

The significance of this suppressed document is that even if, *arguendo*, the optical laser mirrors had been listed on the CCL, the Secretary, by virtue of the finding of foreign availability, had a nondiscretionary duty under the Act to remove the optical laser mirrors from the CCL and was *precluded as a matter of law from requiring a license to export them.*

Congress, in section 2403(b)(2) of the EAA, commanded that whenever there is a finding by the Secretary

that a commodity is available without restriction from sources outside the United States, the Secretary is subject to a mandatory legal obligation to remove controls on the export of such commodity from the United States unless the President determines that absence of controls would prove detrimental to the national security of the United States. (App. 30a). This contention was *completely ignored* by the court of appeals and constitutes an independent legal basis for requiring reversal of the Ninth Circuit. Thus, even if the Ninth Circuit was correct to conclusively presume the commodity had been listed on the CCL, under the terms of the EAA, the listing would have been *per se* unlawful and void.

Subsequently, this misinterpretation of the EAA by the Ninth Circuit came to the attention of Congress which was engaged in reauthorization of the EAA. As shown hereafter, the leadership of the Committee and Subcommittee having jurisdiction over this legislation rejected the interpretation of the Ninth Circuit and explicitly called on "the Ninth Circuit to reverse itself and thereby join in the uniform national rule established by the *Gregg* and *Moller-Butcher* cases which correctly interpreted the intent of Congress." 137 CONG. REC. H8728, (Daily ed., October 30, 1991).

Petitioners thereupon submitted their Motion to Reinstate Their Appeal to the Ninth Circuit on February 25, 1992, requesting that court to take note that its interpretation of the EAA conflicted with the decisions of the First, Second and Eighth Circuits and thus created the anomaly that there was no consistent nationwide rule as to when a federal crime would be committed under the EAA; and secondly, that its interpretation was expressly repudiated by the leadership of the relevant committee in Congress and that the interpretation of the First, Second and Eighth Circuits was the correct interpretation of the Export Administration Act.

Congress recognized that the conflict between the

circuits offended overriding public policy concerns that any statute regulating the foreign commerce of the United States be uniformly enforced. It expressly repudiated the Ninth Circuit's decision and requested they reconsider and abandon it.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals for the Ninth Circuit in this case creates an irreconcilable conflict with decisions in the First, Second, and Eighth Circuits interpreting the Export Administration Act of 1969 (EAA) 50 App. U.S.C. *et seq.* on the issue of what constitutes the United States' burden of proof in criminal prosecutions under the Export Administration Act.

As shown *infra* in Part I, Congress has made it unequivocally clear that the Court of Appeals for the Ninth Circuit misinterpreted the Export Administration Act in its decision in *United States* v. *Spawr Optical*.[2]

Moreover, as shown *infra* in part II, Congress during Reauthorization of the Export Administration Act explicitly requested the Ninth Circuit to correct its misinterpretation of the EAA to avert serious harm to the foreign trade system of the United States.

Despite this Congressional request, the Ninth Circuit

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[2] The importance of whether the commodity had *in fact been listed* on the CCL is clear. If the commodity has been placed on the CCL, a validated license is a prerequisite for lawful export. If the commodity has not been listed on the CCL, a license is not required. Thus proof that the commodity has been placed on the CCL is the key determinant of whether export without a license constitutes an illegal act in all of the United States except in the Ninth Circuit.

has obdurately persevered in its erroneous interpretation[3] of the Export Administration Act and ignored the Congressional request "to reverse itself and thereby join in the uniform national rule" governing the government's burden of proof in criminal prosecutions under the EAA.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE PREVAILING INTERPRETATIONS OF THE OTHER CIRCUITS IN THE JUDICIAL BRANCH.

As shown hereafter, the Decision of the Ninth Circuit also conflicts with the unequivocally clear intent of Congress in the EAA and thereby disrupts the comity between the legislative branch and the judiciary that is an imperative necessity in the conduct of this nation's foreign commerce. Moreover, this holding directly conflicts with decisions in

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[3] In addition to Congress, the dissent clearly established that the majority's decision was based upon a fundamental misinterpretation of the controlling statute:

> The majority concludes that "when the Secretary *has* issued a license or order, the factfinder is instructed to accept it as law, without considering its advisability." Majority opinion at page 1473 (emphasis added). Assuming arguendo that this conclusion is a correct reading of the Act, it still does not follow that at a criminal trial the Secretary's determination that a commodity has been placed on the CCL must, as a matter of law, be accepted by the jury. Placing this question before the jury does not challenge the advisability of the Secretary's initial decision to list a commodity on the CCL. Therefore, requiring the government to prove at a criminal trail that the Spawrs' laser mirror *was* on the CCL at the relevant time would not "undermine the Secretary's authority" because such a requirement in no way challenges the Secretary's initial decision to place commodities on the CCL and to issue or refuse to issue licenses accordingly.

Spawr Optical, 864 F.2d at 1474-1475 (emphasis added) (App. 16a).

three other Circuits.[4]

As a result of the Ninth Circuit's misinterpretation of the EAA, the law has become confused regarding the prosecution's burden of proof in a criminal proceeding alleging violation of the Export Administration Act, a major law regulating important aspects of the international trade of

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[4] The Court of Appeals for the First Circuit in *United States* v. *Moller-Butcher*, 723 F.2d 189 (1983), affirmed the district court's interpretation of the government's burden of proof under the Export Administration Act as including proof of three elements:

> 1. That the commodity in issue was listed on the CCL at the time of export thereby creating the legal requirement for a validated export license before the commodity can be lawfully exported;
> 2. That the commodity was in fact exported without a validated export license; and
> 3. That the defendant acted knowingly.

United States v. *Moller-Butcher*, 560 F. Supp. 550, 553 (D. Mass. 1983).

Similarly, in the Second Circuit, the District Court in *United States* v. *Geissler*, 731 F. Supp. 93 (E.D.N.Y. 1990), also held that the Export Administration Act imposes the same three-pronged burden of proof and specifically requires proof that the commodity in issue was actually listed on the CCL at the time of export:

> Upon reviewing the relevant portions of the EAR [Export Administration Regulations], the Court finds that F-14 aircraft tires are contained in the CCL and therefore are covered by the EAR. . . . [which expressly states that "the export from the United States" . . . is governed by the licensing requirements . . . .

Geissler, 731 F. Supp. at 96 (emphasis added).

Finally, the Eighth Circuit in *Gregg* v. *United States*, 829 F.2d 1430 (8th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988), held:

> When the case gets to court, . . . the government needs to prove . . . that the item exported appears on the Munitions List or the Commodity Control List, as the case may be (and, of course, that the defendant knowingly and willfully exported it, with the necessary intent and knowledge, and without an appropriate license). (Emphasis added)

Thus, all three circuits agree that the government must prove, not merely allege or presume, that the commodity is listed on the CCL. Absent proof of this element, export of a commodity without a validated license is not a crime.

the United States and thereby it has an important impact on United States foreign policy and national security.[5]

II. CONGRESS HAS MADE IT UNEQUIVOCALLY CLEAR THAT THE COURT OF APPEALS FOR THE NINTH CIRCUIT MISINTERPRETED THE EXPORT ADMINISTRATION ACT IN ITS DECISION IN *UNITED STATES* v. *SPAWR OPTICAL RESEARCH, INC.*

On June 6, 1990, in connection with the reauthorization by Congress of the Export Administration Act, Congressman Frank Horton of New York, the ranking minority member of the Government Operations Committee, engaged in the following colloquy with Congressman Gejdenson of Connecticut, the Chairman of the Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs, which has primary jurisdiction over the Export Administration Act, and with Congressman Roth of Wisconsin, the ranking minority member of the Subcommittee:

> Mr. HORTON. Mr. Chairman, I rise along with the gentleman from California [Mr. MCCANDLESS] to engage the gentleman from Connecticut [Mr. GEJDENSON] and the gentleman from Wisconsin [Mr. ROTH] in a colloquy.
>
> Mr. Chairman, as you know I am concerned that, since the decision of the U.S. Court of Appeals for the Ninth Circuit in

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[5] Interpretation of the EAA to vest plenary power in the Secretary of Commerce to determine conclusively and after the fact that an exported commodity was listed on the CCL and required a license would produce a system in which no exporter would dare incur the risk of exporting any commodity without first obtaining a license. This would overload the licensing system process and produce inordinate delay in the export trade of the United States.

Spawr Optical Research, Inc. v. *United States*, 864 F.2d 1467 (1988), there is no longer a clear nationwide rule governing the burden of proof the U.S. Government must prove in criminal prosecutions under the Export Administration Act. I understand that you have included an amendment in H.R. 4652 which will make it completely clear that the U.S. Government is required by law to prove that the commodity that was exported was, in fact, listed by the Secretary of Commerce on the commodity control list at the time of export. Is that correct?

Mr. GEJDENSON. Yes. As we stated at page 17 of the House Report on H.R. 4653:

"The Committee believes that it is for the Government to prove that the item exported was on the commodity control list at the time of export."

Mr. HORTON. Mr. Chairman, am I correct that the Export Administration Act requires the Government to prove beyond a reasonable doubt that:

First, the commodity in question has, in fact, been listed by the Secretary on the commodity control list -thus creating the legal requirement to obtain a validated license prior to export;

Second, the commodity was exported without obtaining such a license; and

Third, that the exporter intended to export the commodity?

Mr. GEJDENSON. Yes. That is a correct statement of what the act requires. This amendment is intended to clarify what the Export Administration Act has required since its original enactment.

Mr. HORTON. Mr. Chairman, I would ask the ranking member, the gentleman from Wisconsin [Mr. ROTH], if he agrees with these responses?

Mr. ROTH. Mr. Chairman, I agree with the gentleman from Connecticut [Mr. GEJDENSON].

Mr. McCANDLESS. Mr. Chairman,

> will the gentleman from New York [Mr. HORTON] yield?
>
> Mr. HORTON. I yield to the gentleman from California.
>
> ...
>
> Mr. McCANDLESS. My question is this. Is the Chairman satisfied that H.R. 4653 will make it clear that it was Congress' intent at the time the Export Administration Act was enacted, and that it remains Congress' intent that, in prosecutions under the act, the government is required to prove that an exported commodity was on the commodity control list at the time it was exported?
>
> Mr. GEJDENSON. Yes. The committee report on H.R. 4653 makes it clear that it was and is Congress' intent to require the Government to [prove] in criminal prosecutions under the act, that the commodity in question was in fact listed on the commodity control list. If a commodity was not listed, it would not be a crime under the act to export it without a license.

136 CONG. REC. H3281 (Daily ed. June 6, 1990).

Subsequently, Congress reauthorized the Export Administration Act, but President Bush vetoed the legislation for reasons that do not pertain to this issue. *Presidential Memorandum of Disapproval* (November 16, 1990).

Thereafter, on October 30, 1991, a further colloquy occurred:

> Mr. HORTON. . . .
>
> Mr. Chairman, on June 6, 1990 we discussed the problem that was created with respect to the Export Administration Act by a decision of the U.S. Court of Appeals for the Ninth Circuit in *Spawr Optical Research, Inc.* v. *United States*, 864 F.2d 1467 (1988). The problem is that since this judicial decision there is no longer a clear nationwide rule governing the burden of proof the U.S. government must sustain in criminal

prosecutions under the Export Administration Act. In that colloquy on June 6, 1990, it was agreed that the court of appeals for the ninth circuit had misinterpreted the Export Administration Act requirement that the U.S. Government must prove that the exported item was in fact listed by the Secretary of Commerce on the commodity control list thus creating the legal requirement to obtain a validated license prior to export.

In your position as Chairman of the Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs, is this your understanding of the law?

Mr. GEJDENSON. If the gentleman will yield, that is correct.

Mr. McCANDLESS. Mr. Chairman, will the gentleman yield?

Mr. HORTON. I yield to the gentleman from California.

Mr. McCANDLESS. I would like to add that Federal courts in the first and eighth circuits have issued decisions which enunciate the legally correct interpretation of the Export Administration Act. For example, in *United States* v. *Gregg*, 829 F.2d 1430, 1437 (8th Cir. 1987) the eighth circuit clearly stated "when the case gets to court, all the government needs to prove is that the item exported appears on the munitions list or the commodity control list, as the case may be, and that the defendant knowingly and willfully exported it, with the necessary intent and knowledge, and without the appropriate license." The same rule applies in the first circuit, *United States* v. *Moller-Butcher*, 560 F.Supp. 552-553 (D. Mass. 1983) [*aff'd* 723 F.2d 189 (1st Cir. 1983)].

In an earlier colloquy, Chairman GEJDENSON made it explicitly clear that these cases have properly interpreted the Export Administration Act. He stated that the report on H.R. 4653 makes it explicitly clear that is was and is Congress' intent to require the

Government to [prove] in criminal prosecutions under the act, that the commodity in question was in fact listed on the commodity control list. If a commodity was not listed, it would not be a crime under the act to export it without a license. Mr. Chairman, is this still the gentleman's understanding of the law.

Mr. GEJDENSON. Mr. Chairman, if the gentleman from New York will yield; yes, it is.

Mr. HORTON. Finally, as I did in our earlier colloquy on this issue I would like to note that the ninth circuit has issued yet another decision which aggravates the problem. On September 14, 1990, the Court of Appeals for the Ninth Circuit in a case styled United States v. Mandel, reaffirmed the Spawr decision as the controlling precedent governing the burden of proof the U.S. Government must prove in criminal prosecutions under the Export Administration Act.

Under the Spawr decision, the ninth circuit held that the U.S. Government need not prove beyond a reasonable doubt that the commodity in issue had been listed on the commodity control list and therefore was subject to the export licensing requirement. Mandel reaffirms the *Spawr* holding and explicitly reiterates that judges and juries must accept without question the U.S. government's allegation that the Secretary of Commerce had listed the commodity on the commodity control list prior to the export of the commodity.

We cannot continue to allow the proliferation of the Spawr decision to wreak havoc on our export trade and the free exchange of technical and scientific ideas. It is clear that the lack of a uniform national standard concerning the burden of proof in criminal prosecutions under the Export Administration Act adversely impacts the dissemination of scientific information,

creates a chilling effect on the free exchange of ideas, and impairs our export trade. I have been contacted by scientists and exporters who urge Congress to clarify this matter and to reestablish a uniform nationwide rule. I reiterate that the Optical Society of America believes that the Spawr decision has created an intolerable situation and urges Congress to establish a uniform national rule, namely, the Gregg rule, and to repudiate the misinterpretation of the law by the ninth circuit in the Spawr decision.

Subsequent to our colloquy in this matter, Congress passed legislation which would have extended the Export Administration Act with amendments not germane to this problem. The President vetoed this legislation for reasons that, again, are not germane to this problem. The status quo ante under the Export Administration Act is now maintained by Executive Order.

Whether the Export Administration Act is kept in force by Executive order or extended legislatively, the problem remains that the ninth circuit has misapprehended that law. In the interval since our earlier colloquy it has come to my attention that yet another case has been decided by a federal district court in the ninth circuit in which the Spawr case and the Mandel case are treated as the law of the circuit. I refer here to *United States* v. *Adelkadar Helmy*, at 712 F.Supp. 1423 (E.D. Calif. 1989). Does the gentleman from Connecticut join us in the desire to see the ninth circuit remedy the problem created by the Spawr case?

Mr. GEJDENSON. Mr. Chairman, I join the gentleman from New York and the gentleman from California in calling on the ninth circuit to reverse itself and thereby join in the uniform national rule established by the

> *Gregg* and *Moller-Butcher* cases which correctly interpret the intent of Congress.

137 CONG. REC. H8728 (Daily ed. October 30, 1991).

III. CONGRESS, DURING REAUTHORIZATION OF THE EXPORT ADMINISTRATION ACT, EXPLICITLY REQUESTED THE NINTH CIRCUIT TO CORRECT ITS MISINTERPRETATION OF THE EXPORT ADMINISTRATION ACT TO AVERT SERIOUS HARM TO THE INTERNATIONAL TRADE SYSTEM OF THE UNITED STATES.

On October 26, 1992, the second of three colloquies took place in Congress which addressed the serious injury to the national interest which the Ninth Circuit's decision in *Spawr Optical* inflicts:

> Mr. HORTON, [Ranking Minority Member, Government Operations Committee] Mr. Speaker, I rise along with the gentleman form California [Mr. MCCANDLESS] to engage the gentleman from Florida [Mr. FASCELL] [Chairman, House Foreign Affairs Committee] and the gentleman from Wisconsin [Mr. ROTH] [ranking Minority Member, House Foreign Affairs] in a colloquy.
>
> ...
>
> In the period since our colloquy, ... the Ninth Circuit has issued yet another decision which aggravates the problem. On September 14, 1990, the Court of Appeals for the Ninth Circuit in a case styled United States versus Mandel, reaffirmed the Spawr decision as the controlling precedent governing the burden of proof the U.S. Government must prove under the Export Administration Act.
>
> Under the Spawr decision the Ninth

Circuit held that the U.S. Government need not prove beyond a reasonable doubt that the commodity in issue had been listed on the commodity control list and therefore was subject to the export licensing requirement. Mandel reaffirms the Spawr holding and explicitly reiterates that judges and juries must accept without question the U.S. Government's allegation that the Secretary of Commerce had listed the commodity on the Commodity Control List prior to the export of the commodity.

Mr. Speaker, I say to the Chairman, the proliferation of the Spawr decision is beginning to produce devastating effects on our export trade and the free exchange of technical and scientific ideas. I have letters from well-known scientists and scientific societies and important exporters who assert that this lack of a uniform national standard concerning the burden of proof in criminal prosecutions under the Export Administration Act adversely impacts the dissemination of scientific information, creates a chilling effect on the free exchange of technical information and ideas, and impairs our export trade. All of these scientists and exporters urge Congress in the reauthorization of the Export Administration Act to clarify this matter and to reestablish a uniform nationwide rule. To cite but one example, the Optical Society of America, the largest society in the world devoted to the scientific and technological applications of light publishes five journals throughout the world dealing with advanced technical subjects and conducts numerous international conferences. The Optical Society believes that the Spawr decision has created an intolerable situation and urges Congress to establish a uniform national rule, namely the Gregg rule, and to repudiate the misinterpretation of the law by the Ninth Circuit in the Spawr decision. I say to the Chairman, I believe there is complete agreement in both Houses that there must be

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a clear, uniform national rulion.

Congress to clarify the situat October 26, 1990).

136 CONG. REC. H12778 (Daily ed ica, Inc., referred to by

The Optical Society of Amer*nicus curiae* jointly with Congressman Horton, filed a brief *a*rmentation Engineers in the Society of Photo-Optical Instruition for Certiorari that support of petitioners' previous Petcts of the *Spawr Optical* summarized one of the adverse impa decision:

> The effect of the conflict in the Circuits concerning criminal prosecu tions under the EAA us to discourage scientists from attending meetings, publish ing papers and initiating research subjects. The effect is to raise serious Sixth Amend ment and First Amendment issues. Until this matter is resolved, scientists, tec hnicians, and academicians who participate in a symposium or conference or who publis h or disseminate scholarly papers and ideas un the risk that the Secretary of Commerce o r his subordinate will initiate a prosecution -- and the accused scientists will not be permitted to rebut with fact the chief element of the criminal charge.

Brief of the Optical Society of Amer ica, Inc. and the Society of Photo-Optical Instrumentation Engineers as *Amici Curaie* at 15, *United States* v. *Spawr Optical Research, Inc.*, 864 F.2d 1467 (9th Cir. 1988) (No. 88-1708), *cert. denied*, 493 U.S. 809 (1989).

The Laser and Electro-Optical Manufacturing Association, a non-profit trade association representing Association, also filed a brief amicus curiae supporting more than ninety percent of companies which manufacture mor ment produced in North America, also filed a brief amibed the "chilling effect" petitioners' petition in which it descr of the majority's decision:

> Exporters will be reluctant to incur the risk of exporting any commodity or technology when

> the Secretary of Commerce, for whatever reason, can allege after the fact of export that the commodity or technology was on the Control List and required an export license. In such a system the mere act of exporting a commodity or technology may be made a crime. Whether the allegation is right or wrong is irrelevant, according to the court below. The normal judicial machinery - judge and trial by jury - would be powerless to check any abuse because under the decision of the divided panel of the court below, they are not competent to rule on the issue of whether in fact the commodity or technology has been placed on the Control List.
>
> The practical result is that many exporters would be reluctant to incur such a risk and a great many more exports would be made only after seeking a license. The present system is inadequate to administer such a volume of applications. The result is plain. United States exports of high technology goods and data would be delayed by an overburdened system to the sole advantage of foreign competitors able to promptly fill orders that American businesses would be unable to supply in a timely fashion.

Brief for the Laser and Electro-Optical Manufacturers Association as *Amicus Curaie* at 11, *United States* v. *Spawr Optical Research, Inc.*, 864 F.2d 1467 (9th Cir. 1988) (No. 88-1708), *cert. denied*, 493 U.S. 809 (1989).

There is an urgent need to correct this situation by setting aside *Spawr Optical* and recognizing the correct intent and meaning of the Export Administration Act with respect to the Government's burden of proof (as described in the June 6, 1990, colloquy) that applies in criminal proceedings for violation of the Export Administration Act: "[t]he committee believes that it is for the government to prove that the item exported was on the commodity control list at the time of export." 136 CONG. REC. H3281 (Daily ed. June 6, 1990) (Statement of Rep. Gejdenson).

IV. THE NINTH CIRCUIT'S CONCLUSIVE PRESUMPTION THAT "ONCE THE GOVERNMENT ALLEGES THAT THE COMMODITY WAS LISTED ON THE CCL ... THAT RIGHT OR WRONG, THE TRIAL COURT MUST ACCEPT THIS DETERMINATION AS A MATTER OF LAW" WAS FIRST RESORTED TO IN THE SECTION 2255 PROCEEDING IN ORDER TO AVOID THE CONSEQUENCES OF PROSECUTORIAL MISCONDUCT AT THE CRIMINAL TRIAL.

One of the most striking anomalies in this case is that at no stage in the initial criminal prosecution was it ever disputed that the prosecution was required to prove that the commodity was in fact listed on the CCL. The fundamental premise of the entire criminal prosecution was that proof that the commodity had been listed on the CCL is a prerequisite for triggering the legal requirement for a validated export license before the commodity could be legally exported. Until the government proves that the commodity was in fact listed on the CCL, the government cannot prove that a validated export license is required by law. Nor can it establish that exporting without a license is a crime.[6]

---

[6] This principle was recognized at the grand jury proceedings (see Testimony of Commerce Department employee Robert W. Rice, grand jury proceedings, Los Angeles, CA, August 27, 1980, 3-17); it was recognized in the indictment (which charges the defendants violated section 2405(b) of the EAA by exporting to the Soviet Union a commodity controlled for national security purposes, i.e., a commodity listed on the CCL); it was recognized by the trial court and all parties to the pre-trial conference (Trial transcript 84); it was recognized by the prosecutor in his opening statement (Trial transcript 278, 283); in the prosecution's selection of expert witnesses to adduce evidence that the commodity had in fact been listed on the CCL (Testimony of Government witnesses Boidock, Trial transcript 633; Wick, Trial Transcript 103, 1014; Winter, Trial transcript 1039-1047; and

At the trial, the petitioners *stipulated* that they had exported the commodity and that they had done so without a validated export license. The *entire dispute at trial focused on whether the commodity in question had in fact been listed on the CCL*. If the commodity had been listed on the CCL, a crime had been committed; if the commodity had not been listed on the CCL, no crime was committed.

There is no dispute that the Ninth Circuit's present version of the burden of proof in Export Administration Act criminal prosecutions *first emerged* in the 2255 proceeding. It was in this 2255 proceeding that petitioners first became aware of the gross prosecutorial misconduct of which they had been victims in the original trial and first established in the record the full inventory of prosecutorial misconduct of which they were victims:

> 1. The suppression of expert testimony and evidence that would have proved that the commodity was not listed on the CCL at the time of export without a license. (App. I at 45a).
>
> 2. The falsification of evidence by means of the submission of a fake list to convince the judge and jury that the commodity was in fact included on the list at the time of export. (App. G at 34a). (Trial transcript 115, 117).
>
> 3. The suppression of evidence that the commodity at issue was freely available in

---

Avizonas, Trial transcript 1933-1952); and in the prosecutor's opening argument (Trial transcript 2080-2083). In addition, it was recognized by the trial judge (Trial transcript 1787-1796, 1801, 1919-1922) and was incorporated into his instructions to the jury (Trial transcript 2316-2319).

> non-CoCom countries[7] (App. H at 41a), which precludes as a matter of law the imposition of an export license requirement, EAA section 2402(b)(2), and was thereby an absolute defense.

Thus, the government, to avoid the consequences of their prosecutor's misconduct was forced to resort to the absurd theory that the guilt-determinative question of fact (*i.e.*, whether the commodity was in fact listed on the CCL) could be conclusively presumed rather than proved. It was precisely this theory that Judge Brunetti and his colleague embraced.[8]

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[7] Countries, other than Australia, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom and the United States, which, by multilateral agreement (The Coordinated Committee for Multilateral Export Controls (CoCom), control the export of commodities listed on the CCL to communist dominated countries.

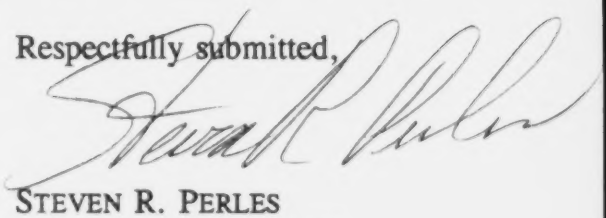
[8] Consequently, if the divided panel's interpretation of the EAA was deemed to be a correct reading of the Act and the guilt-determinative element of the crime is "not a triable issue," neither the trial court, the jury, the prosecution nor the Spawrs were aware of this interpretation. Accordingly, petitioners' conviction would be invalid for the reason that the Spawrs' position at trial constituted an inadvertent confession of a crime despite pleading not guilty. The Spawrs were provided a jury trial to dispute that the commodity was on the CCL and to dispute the claim that an export license was required by law. Under the divided panel's opinion the entire trial was a meaningless farce. A guilty verdict was assured when the Spawrs stipulated they had exported the commodity without a license. The stipulation was the functional equivalent of an inadvertent confession to a crime.

It is well-settled that a statement of fact amounting to a confession if made with less than full information and knowledge of the circumstances, invalidates a criminal conviction. For a confession to support a conviction, the record must show that the defendant, in making the confession, was "fully aware of the direct consequences" of the confession. *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1985) (quoting *Brady* v. *United States*, 397 U.S. 742, 755 (1970)). Due process requires that the defendant be "fairly

CONCLUSION

For each of the foregoing reasons, the Supreme Court should grant *certiorari*: (1) to assure comity between the Congress and the Judiciary in the interpretation of the EAA; and (2) to assure that the negotiation of foreign commerce under the EAA be uniformly enforced by the United States Government.

Respectfully submitted,



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appraised of [the confession's] consequences." *Johnson*, 467 U.S. at 509.

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APPENDIX A

Filed January 8, 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	) No. 87-6272
	)
Plaintiff-Appellee	) D.C. Nos.
	)
	) CR-80-0789-WMB
vs.	) and
	) CR-85-3193-WMB
SPAWR OPTICAL RESEARCH, INC., WALTER J. SPAWR, and FRANCES SPAWR	) ORDER
	)
Defendants-Appellants	)

Before: PREGERSON, WIGGINS, and BRUNETTI, Circuit Judges.

Appellant's motion to reinstate their appeal is DENIED.

APPENDIX B

United States Court of Appeals For the Ninth Circuit ....

United States of America,	)	No. 87-6272
Plaintiff-Appellee	)	
	)	DC Nos.
v.	)	CR-80-0789-WMB
	)	and
Spawr Optical Research, Inc.	)	CR-85-3193-WMB
Walter J. Spawr, and	)	
Frances Spawr,	)	
Defendants-Appellants	)	OPINION
	)	

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge. Presiding

Argued and Submitted
March 7, 1988 - Pasadena, California

Filed December 29, 1988

Before: Harry Pregerson, Charles Wiggins
and Melvin Brunetti, Circuit Judges

Opinion by Judge Brunetti: Dissent by Judge Pregerson

OPINION

BRUNETTI, Circuit Judge:

BACKGROUND

In the early 1970's, Walter Spawr, an optics expert, invented a superior process for polishing laser mirrors. By 1975, Walter and his wife Frances, through their corporation, Spawr Optical Research, Inc. (collectively "the Spawrs"), were marketing their laser mirrors nationally and exploring international markets.

In January 1976, the Spawrs accepted an order from a purchasing agency of the Soviet Government. They began filling the order in June of that year by delivering some of the mirrors to their agent in this country, who then departed for West Germany. The Spawrs shipped the balance of the order to the agent in West Germany in July. The agent then forwarded the entire order to Moscow. The Spawrs never attempted to obtain an export license for this shipment of mirrors.

In April 1976, the Spawrs received a second Soviet order. Walter decided to seek an export licerse for a portion of this second order. He filed a license application with the Commerce Department in May, identifying his agent in West Germany as the end-user of the mirrors. On October 7, 1976, the Secretary of Commerce ("Secretary") denied the application, having determined that the Spawrs' mirrors were included on the Commodity Control List ("CCL"),[1] and that they had

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[1] The CCL, established by the Secretary pursuant to 50 App. U.S.C. §2403(b) and §2404(c), "specifies the goods subject to export controls and the group of countries to which exports of certain products are restricted. By the use of code numbers and letters following products on the list, an exporter can determine whether a particular shipment of goods requires a validated license or not." *United States v. Mollier-Lutcher*, 560 F. Supp. 550, 552 (D. Mass. 1983); *see* 15 C.F.R. §399.1.

"significant strategic applications" posing a potential threat to national security.

In November, because of their inability to obtain an

In November, because of their inability to obtain an export license, the Spawrs canceled the second Soviet order. However, in February 1977, they shipped mirrors to a freight forwarder in Switzerland. Their agent then relabeled the boxes containing the mirrors and forwarded the shipment to Moscow.

In 1980, the Spawrs were indicted for misrepresenting shipment values in declarations submitted to the United States Customs Service, a violation of 18 U.S.C. §1001 (Counts 1-6); conspiracy to export laser mirrors without a required license, a violation of 18 U.S.C. §371 (Count 10); and exporting laser mirrors without a required license, with knowledge that they would be transshipped to the Soviet Union, a violation of export administration regulations (Counts 7-9, 11-14).[2] A fifteenth count was dismissed on the court's motion.

After a jury trial, the corporation was convicted on all charges (Counts 1-14), Walter was convicted on the conspiracy and 1977 exporting charges (Counts 10-14), and Frances was convicted on the misrepresentation, conspiracy, and 1977 exporting charges (Counts 1-6, 10-14).[3] The Spawrs appealed

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[2]Counts 7-5 relate to the 1976 exports filling the first Soviet order. They charge violation of 15 C.F.R. §371.2, 372.1(b), 387.6 and then §6(b) of the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841, 844 ("1969 Act"), formerly 50 App. U.S.C.#2405(b)). Counts 11-14 relate to the 1977 exports filling the second Soviet order, which occurred after the 1969 Act had expired and before it was reenacted by Pub. L. No. 95-52-91 Stat. 235 (1977) (superseded by the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 533 ("1979 Act") (codified as amended at 50 App. U.S.C. §2401 et seq.)). They charge, in addition to the aforementioned regulations and 15 C.F.R. §387.1(a), violation of Exec. Order No. 11940, 3 C.F.R. §150 (1976) (revoked by Exec. Order No. 12002, 3 C.F.R. §133 (1977), *reprinted in* note to 50 App. U.S.C. §2403), and §5(b) of the Trading with the Enemy Act, ch. 106, 40 Stat. 411, 4, 5 (1918) (codified as amended at 50 App. U.S.C.§5(b)), which maintained the 1969 Act regulations in force until the 1969 Act could be reenacted.

[3]The trial court sentenced the corporation to fines totalling $100,000, and placed the corporation on probation for five years. Frances was given five year suspended sentences on Counts 1-6 and 10-14, and placed on

their conviction on four grounds: that the export regulations relied on by the government were defunct; that government misconduct prejudiced their defense; that the trial court erred by admitting co-conspirator statements lacking a proper evidentiary foundation; and that the evidence was insufficient to support their convictions. This court affirmed their convictions in *United States v. Spawr Optical Research, Inc.* 685 F. 2d 1076 (9th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983).

In 1985, the Spawrs collaterally attacked their convictions by filing a petition under 28 U.S.C. §2255 requesting the district court to set aside their sentences on ten new grounds not raised at trial or on appeal. The district court denied its petition in its unpublished order filed October 9, 1986, because the Spawrs had not demonstrated that they had cause for failing to raise their issues at trial or on appeal, or that they had been prejudiced by the alleged trial defects.

The Spawrs then moved for reconsideration of the district court's order denying the §2255 petition. They moved the district court to reconsider on two of the grounds relied on in the petition: that they had ineffective assistance of counsel, and that the prosecution withheld exonerating evidence in violation of *Brady*. The Spawrs also filed an additional motion alleging another instance of prosecutorial misconduct -- that the prosecution intentionally provided the court with the wrong CCL. The district court denied the Spawrs' motion in its unpublished order, filed July 21, 1987, for essentially the same reasons as its earlier denial.[4]

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probation for a period of five years. Her sentences ran concurrently. Walter was given a five year sentence on Count 10, and ten year sentences on Counts 11-14. His sentences also ran concurrently. Walter was to serve the first six months of his sentence in custody, and the remainder of the sentence was suspended. He was put on probation for a period of five years after the expiration of his six months in custody.

[4]Most of this background discussion is drawn from the district court's unpublished Order Denying Section 2255 Petition, at p. 1 n. 1; the district court's Order Denying Defendants' Motion for Reconsideration of Order

On appeal, the Spawrs renew the three contentions of trial error raised in their earlier motion to reconsider -- *Brady* violations, the prosecution's knowing production of misleading evidence, and ineffective assistance of counsel. The government addresses the Spawrs' arguments and further contends that this appeal should be dismissed for lack of jurisdiction, for undue delay in filing §2255 motion, and for failure to assert claims at trial or on direct appeal. The district court's denial of the Spawrs' §2255 motion is reviewed *de novo*. *See United States v. Quan*, 789 F. 2d 711, 713 (9th Cir. 1986).

JURISDICTION

The government contends that the district court lacked jurisdiction over the Spawrs' §2255 motion because the Spawrs are no longer in custody. We disagree.

The district court's jurisdiction over this motion is measured at the time of filing. So long as the Spawrs were in custody at that time, jurisdiction is present. *See 16 Federal Procedure* §41:15 at 328-29 (1983). The district court has stated that the Spawrs were serving five year probationary terms when they filed their §2255 motion. A probationary term is sufficient custody to confer jurisdiction. *See Wright v. United States*, 732 F. 2d 1948, 1050 n. 1 (2d Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

Apparently the government, believing that the Spawrs were released from probation after filing, is actually making a mootness argument. The district court rejected this contention, relying primarily on Supreme Court authority, *Lane v. Williams*, 455 U.S. 624 (1982); *Sibron v. New York*, 392 U.S. 40 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968), and authority from this court, *United States v. Hearst*, 638 F. 2d

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Denying Section 2255 Motion, at pp. 1-3; and this court's opinion on direct appeal, *see Spawr*, 685 F. 2d at 1078-80 & nn. 1-6.

1190 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); *Courtney v. United States*, 486 F. 2d 1108 (9th Cir. 1973). We agree with the district court that this motion is not moot.

In *Carafas*, the court held that, so long as the adverse consequences of a criminal conviction remain, a petition for a writ of habeas corpus is not moot, even though the petitioner's custody has expired since filing. 391 U.S. at 236-38. Shortly thereafter, in *Sibron*, the Court reached a similar result. 392 U.S. at 50-58. In *Lane*, the Court found the petition at issue to be moot. However, it did so on the ground that the petitioner, who was no longer in custody, had challenged only the sentence. The Court, citing *Carafas* and *Sibron*, emphasized that the petitioner had challenged the conviction itself. 455 U.S. at 630-33.[5]

[1] The Spawrs have raised a number of challenges to their convictions (e.g. ineffective assistance of counsel). Thus, the distinction identified in *Lane* is not an obstacle to the remedy sought in this case. Moreover, it is evident that collateral consequences of the Spawrs' convictions still remain. For example, as the district court and the Spawrs have noted, the Spawrs are unable to receive government contracts until 1991. It may also be true that direct consequences of the convictions remain -- the Spawrs claim that their corporation has not completed payment of its fine, and that their probation terms have not expired (the government has stated otherwise). As a result, this §2255 motion is still viable under *Carafas* and *Sibron*.

As a final matter, the government requests this court to dismiss the motion because of the Spawrs' delay in filing. Rule 9 of the Rules Governing §2255 Proceedings provides:

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[5]These Supreme Court decisions involved petitions for habeas corpus and not §2255 motions. Nevertheless, this court's decisions in *Hearst*, 638 F. 2d at 1192 n. 1, and *Courtney*, 486 F. 2d at 1109 n. 1, clearly establish that *Carafas* and its progeny apply with equal force to §2255 motions.

(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

However, it should be emphasized that the government must first make a show of prejudice. *See 16 Federal Procedure* §41:507 at 594 (1983). Beyond its request for dismissal due to delay, the government makes no showing or prejudice. Therefore, its request is denied.

PROCEDURAL DEFAULT

The government also contends that the Spawrs' §2255 motion should be dismissed because the issues presented were not raised at trial or on direct appeal. It maintains that under *United States v. Frady*, 456 U.S. 152, 167 (1982), the Spawrs must show "cause" to excuse their procedural default and "actual prejudice" from the alleged trial errors. The government claims that the Spawrs have done neither.

In *Sunal v. Large*, 332 U.S. 174 (1947), the Supreme Court capsulated the law concerning the availability of habeas relief in the face of such procedural defaults. The Court first stated the general rule that "the writ of habeas corpus will not be allowed to do service for an appeal." *Id.* at 178. The Court then acknowledged an exception for errors of constitutional magnitude as opposed to mere errors of law and procedure. *Id.* at 178-79. However, the Court limited this "constitutional" exception to exceptional circumstances for which no reasonable alternative to habeas existed for their correction. *Id* at 179-80, 183-84.

Years after §2255 was enacted, the Court decided *Kaufman v. United States*, 394 U.S. 217 (1969). In *Kaufman*, the Court generally reaffirmed the principles set out in *Sunal*. But it stated that constitutional claims should not be denied solely because they should have been raised on appeal. *Id.* at 223-24. Whereas the Court imposed no requirement on petitioners to show cause and prejudice, it implied that constitutional claims should not be decided when direct appeal procedures were deliberately bypassed. *Id.* at 220 n. 3.

In *Davis v. United States*, 411 U.S. 233 (1973), the Court once again affirmed the foregoing principles with one exception. It distinguished *Kaufman* and carved out a class of constitutional claims that would not be so readily decided initially on a §2255 motion. These claims are those that run afoul of express waiver provisions such as Fed. R. of Crim. P. 12(b)(2)(objections to indictment waived unless raised by motion before trial). The *Davis* court restricted the judicial discretion to be exercised in these §2255 cases by requiring the petitioner to show "cause and prejudice." 411 U.S. at 243-245.

This same standard was applied to a claim that ran afoul of Fed. R. of Crim. P. 30 (objections to jury charge waived unless raised before jury retires). See *Frady*, 456 U.S. at 167-68. In reaffirming *Davis*, the *Frady* Court did not expressly overrule *Kaufman* (nor did it have reason to). The Court has not modified its position further.

[2] In this case, each of the Spawrs' claims is constitutionally based, either on the Fifth or Sixth Amendment. Thus, the general rule that claims cannot be raised initially in a §2255 motion is inapplicable. The question becomes whether these claims fall under the "cause and prejudice" rule of *Davis* and *Frady*.

[3] We find that we need not resolve this question. Assuming that "cause and prejudice" are not threshold barriers to the Spawrs' motion by virtue of *Davis* and *Frady*, showings of materiality or prejudice are nonetheless required before relief

can be granted on claims of prosecutorial misconduct and ineffective assistance of counsel.[6] As we discuss below, the *Spawrs are* unable to meet even the slightest burden of showing the materiality of the alleged trial defects, or the prejudice caused thereby, because the issue to which each of their claims relate was not a disputable issue in their criminal trial.

MATERIALITY

[4] The first of the Spawrs' claims is based on the government's duty to disclose to the defense material of an exculpatory nature. *See Brady*, 373 U.S. at 87. The Spawrs contend that the government knowingly suppressed testimony of a laser mirror expert and an Air Force Colonel. They argue that had this testimony not been suppressed, it "would have established that the mirrors exported by the Spawrs were not on the Commodity Control List and did not require an export license."

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[6]In order to establish a *Brady* violation, the defense must show that the exculpatory evidence suppressed by the government was material; that is, "had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 657, 682 (1985) (plurality). Before the prosecution's knowing proffer of misleading evidence will result in a new trial, the materiality of that evidence must also be established. "A new trial is in order if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury." *United States v. Polizz*, 801 F. 2d 1543, 1550 (9th Cir. 1986). And prejudice is a necessary element of a claim of ineffective assistance of counsel. In most cases, the prejudice requirement can only be met if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The *Strickland* standard for prejudice has been considered to impose virtually the same burden on the defense as the standard for materiality in *Brady* claims. *See Bagley*, 473 U.S. at 682. The burden on the defense in claims of knowing production of false evidence, however, is less imposing, akin to the harmless error standard which requires the government to show immateriality. *See Bagley*, 473 U.S. at 679-80 n. 5.

The second claim is based on another allegation of prosecutorial misconduct. The Spawrs assert that during the course of the trial, the government knowingly provided the court with an incorrect CCL. Had the correct version been provided, they maintain, the court would have instructed the jury differently as to the presence of the Spawrs' mirrors on the CCL.

The third and last claim alleges ineffective assistance of counsel. The record clearly reveals that the Spawrs' entire dissatisfaction with counsel relates to the licensing issue. The Spawrs argue that counsel failed to secure relevant expert testimony on the question of whether their mirrors were included on the CCL, and that counsel failed to detect the recurring instances of prosecutorial misconduct.

[5] These three claims relate entirely to a single issue: whether the Spawrs' mirrors were included on the CCL and therefore required an export license. The claims can only be material if this licensing issue was in controversy during trial. If the issue was not in controversy, the Spawrs would hardly be entitled to relief based on the prosecutor's misconduct regarding evidence probative of that issue or defense counsel's failure to detect such misconduct.

In its denial of this §2255 motion, the district court held that the Spawrs' claims were not material because the question of whether the Spawrs' mirrors were included on the CCL was not a triable issue. It stated that the executive branch, rather than a jury, is empowered to determine which commodities require export licenses; and in this case, the Secretary had determined that the Spawrs' mirrors were subject to the license requirement. The Spawrs now vigorously contest the district court's holding.

The Spawrs do challenge the conclusion reached in *Moller* v. *Butcher*, 560 F. Supp. at 552-54, that the Secretary has the final word, in the setting of a criminal trial, in determining which items *should* be included on the CCL at any given time. Rather, they challenge the district court's decision to

defer to the Secretary's determination that their mirrors *were* included on the CCL when they applied for an export license. They maintain that this latter determination impacts on an element of the charged offenses; and therefore, due process and the right to a trial by jury preclude deference to the Secretary. As a consequence, the Spawrs argue that a jury (or perhaps a judge) should be permitted to evaluate the evidence and reach a conclusion contrary to that of the Secretary. We disagree.

It is beyond dispute that the export of commodities is a major component in the economic condition of the United States. In addition, the export of certain commodities may have a significant impact on United States' foreign policy and national security. See 50 App. U.S.C. §2402. The enactment of the 1969 Act and later the 1979 Act, as well as the promulgation thereunder of a complex scheme of regulations, is a testament to the important and sensitive nature of the export function.

In this context, we cannot construe the 1969 Act or its regulations to accommodate judicial factfinding on intricate licensing questions. Congress had designated the Secretary as the coordinating official in the area of export administration. It would severely undermine the Secretary's authority if judges and juries in individual criminal proceedings were permitted to reverse licensing determinations. And it would convert the judicial system into a policy-making forum, one in which the judiciary possess significantly less expertise and resources than the Secretary. Congress did not intend this chaotic and potentially dangerous result.

This is evident in Congress' decision to exempt the Secretary's determinations under the 1969 Act from the judicial review provisions of the Administration Procedure Act. *See* §8, 1969 Act (current version codified at 50 App. U.S.C. §2412(a)); *see* also §13(e), 1979 Act (added by amendment, Pub. L. No. 99-64, §114, 99 Stat. 120, 151-52 (1985), codified at 50 App. U.S.C. §2413(e))("The Secretary's written [license

denial] shall be final and is not subject to judicial review.") It is also evident in the language of the two statutory provisions which the exporting counts charged the Spawrs with violating. *See* Former 50 App. U.S.C. §2405(b) (relative to the 1976 exports), and 50 App. U.S. C.§5(b) (relative to the 1977 exports). These provisions make it a crime to violate not only the particular statute or its regulations, but also any license or order issued thereunder. Thus, when the Secretary has issued a license or order, the factfinder is instructed to accept it as law, without considering its advisability.

[6] In this case, the Secretary has determined that the Spawrs' mirrors could not be exported without an export license. Right or wrong, the trial court must accept this determination as a matter of law. The government need not establish independently at trial, as an element of the charged offenses beyond a reasonable doubt, that the Spawrs' mirrors were included on the CCL and therefore subject to the licensing requirement. Because the licensing issue was not an element of the charged offenses, the Spawrs are not denied due process or the right to a jury trial by deference to the Secretary's determination. Rather, given the Secretary's determination, the prosecution must prove only that the Spawrs exported their mirrors without the necessary license and with the appropriate mental state.

At trial, the district court admitted some government testimony and instructed the jury on matters relating to the licensing issue. It is therefore arguable that the district court originally considered this a triable issue. However, because we hold that the need for an export license had already been established conclusively by the Secretary, it was harmless to place this issue before the jury.

CONCLUSION

In the absence of any controversy surrounding this issue, the Spawrs' dependent claims of prosecutorial misconduct and ineffective assistance of counsel are immaterial and non-prejudicial.

Accordingly, the district court's judgment denying the Spawrs' §2255 motion is affirmed.

AFFIRMED.

HARRY PREGERSON, Circuit Judge, dissenting:

I agree with the majority that the Secretary of Commerce's decision to place a commodity on the Commodity Control List ("CCL") is not subject to judicial review. I disagree, however, with the unwarranted conclusion that the majority draws from this initial proposition, to wit: that at a criminal trial the Secretary's factual determination that a commodity had been placed on the CCL is conclusive and thus is not a question for the jury to determine. The authorities cited by the majority support the initial proposition, but not the conclusion drawn from it.

The majority cites two statutory grounds for its reading of the Act. First, Congress exempted the Secretary's decision to place a commodity on the CCL from the judicial review provisions of the Administrative Procedure Act ("APA"). *See* §8, Export Administration Act of 1969, *reprinted* in U.S. CODE CONG. & ADMIN. NEWS 943 (current version codified at 50 App. U.S.C. §2412(a)) (excluding the functions exercised under the Export Administration Act from the operation of the APA's judicial review provisions, 5 U.S.C. §§701-706). Section 704 of the APA provides for judicial

review of *agency action*. The Spawrs are not challenging the Secretary's initial decision to place their commodity on the CCL. What the Spawrs are challenging at their criminal trial is whether their product meets the description of an item previously placed on the CCL by the Secretary.

Second, two of the statutory provisions under which the Spawrs are charged make it a crime to violate any license or order issued by the Secretary. *See* Former 50 App. U.S.C.§2405(b) and 50 App. U.S.C. §5(b). Again these provisions address actions by the Secretary (i.e., placing commodities on the CCL or issuing or refusing to issue an export license) occurring before an alleged criminal violation of the Act occurred. These provisions offer no support for the majority's position that in a criminal trial the factfinder is precluded from determining whether a commodity was in fact listed on the CCL at the time of the alleged criminal violation.

The majority's reliance on *United States* v. *Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983) is similarly misplaced. The district court in *Moller-Butcher* makes clear the distinction between judicial review of (1) whether the Secretary actually did place a commodity on the CCL - a question of fact - and (2) whether the Secretary should have placed a commodity on the list - a questions of advisability:

> Defendants contend that the grand jury must allege and the government must prove not only that the particular goods that defendants are accused of exporting without a license are listed on the CCL, but also that they fall within the category of goods which make a significant contribution to another country.

Moller-Butcher, 560 F. Supp. at 552. In making this distinction, the district court in *Moller-Butcher*, contrary to the majority's position, appears to assume that the first question, whether particular commodities are on the CCL, is a question for the jury. In any event, the holding in *Moller-Butcher* goes

to whether the Secretary "has the ultimate authority to decide which goods are included on the list and how they are classified," *id.*, and not whether the goods were in fact on the CCL.

The majority concludes that "when the Secretary *has* issued a license or order, the factfinder is instructed to accept it as law, without considering its advisability." Majority opinion at page 15770 (emphasis added). Assuming arguendo that this conclusion is a correct reading of the Act, it still does not follow that at a criminal trial the Secretary's determination that a commodity had been placed on the CCL must, as a matter of law, be accepted by the jury. Placing this question before the jury does not challenge the *advisability* of the Secretary's initial decision to list a commodity on the CCL. Therefore, requiring the government to prove at a criminal trial that the Spawrs' laser mirror was on the CCL at the relevant time would not "undermine the Secretary's authority" because such a requirement in no way challenges the Secretary's initial decision to place commodities on the CCL and to issue or refuse to issue licenses accordingly.

In addition to its lack of support in the text of the Act, in its legislative history, and in the case law interpreting it, the majority's reading of the Act also suffers from constitutional infirmities. The Fifth Amendment right to due process and the Sixth Amendment guarantee of a criminal defendant's right to trial by jury require not only that the government prove every element of a criminal offense beyond a reasonable doubt but also that each element be submitted to an impartial trier of fact. *See In Re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *see also Sandstrom* v. *Montana* 442 U.S. 510, 521-22, 99 S.

Ct. 2450, 2458 (1979) (conclusive presumption conflicts with the overriding presumption of innocence and would invade the factfinding function assigned solely to the jury in a criminal case) (citing *Morissette* v. *United States*, 342 U.S. 246 (1952), and *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978)). Whether the laser mirrors exported by the Spawrs were in fact on the CCL at the time they were exported is an essential element of the offenses allegedly committed by them. It was for the jury, not the Secretary of Commerce, to determine whether the Spawrs' laser mirrors were in fact an item listed on the CCL.

Accordingly, I respectfully dissent.

APPENDIX C

United States District Court
Central District of California

United States of America,	)
	) CV 85-3193-WMB
Plaintiff,	) CR 80-789-WMB
	)
v.	)
	) ORDER DENYING
Spawr Optical Research, Inc.,	) DEFENDANT'S
Walter J. Spawr and Frances	) MOTION FOR RE-
Spawr,	) CONSIDERATION
Defendant's	) OF ORDER
	) DENYING SECTION
	) 2255 MOTION
	)

I. FACTS

Walter and Frances Spawr, and their corporation, Spawr Optical Research, Inc. (the Spawrs) were convicted of exporting laser mirrors destined for the Soviet Union without obtaining the required validated export license. The Spawrs appealed their convictions on the basis of four grounds: that the export regulations relied on by the government were defunct; that government misconduct prejudiced their defense; that the trial court erred by admitting co-conspirator statements lacking a proper evidentiary foundation; and that the evidence was insufficient to support their convictions. The Ninth Circuit affirmed their convictions in *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076 (1982), *cert. denied*, 461 U.S. 905, 103 S. Ct. 1875 (1983).

The Spawrs collaterally attacked their convictions by filing a petition under 28 U.S.C. section 2255 requesting the Court to set aside their sentences on ten new grounds not raised at trial or on appeal. The Spawrs asserted that the indictment failed to charge a crime with respect to the exportation of laser mirrors, the Court imposed a sentence in excess of that provided by statute, the Court lacked jurisdiction, the jury instructions were improper, double jeopardy had been violated, the prosecution withheld exonerating evidence, the convictions were obtained by use of a coerced confession, the jury was unconstitutionally selected, they were deprived of their right to question witnesses, and they had ineffective assistance of counsel. The court denied the petition in its order filed October 9, 1986, because the Spawrs had not demonstrated that they had "cause" for failing to raise these issues at trial or on appeal, or that they had been prejudiced by their failure to do so.

The Spawrs now move for reconsideration of the Court's order denying the section 2255 petition. They move the Court to reconsider two of the grounds relied on in the petition: that they had ineffective assistance of counsel, and that the prosecution withheld exonerating evidence. The Spawrs also have filed an additional motion for leave to file a supplemental memorandum in support of the motion, alleging another instance of prosecutorial misconduct -- that the prosecution intentionally provided the Court with the wrong list of commodities prohibited from export.

The Court denies the motion to reconsider and its supplement on the merits.

II. DISCUSSION

Local Rule 7.16 sets forth three grounds for which a court may reconsider a motion: "(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been

known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." The Rule states that "[n]o motion for reconsideration shall in any matter repeat any oral or written argument made in support of or in opposition to the original motion." Although not expressly stated, from their arguments it appears that the defendants request reconsideration under subsection (a) or (b). Giving the defendants the benefit of every doubt, the Court will assume that defendants have presented sufficient grounds to justify consideration of the merits of their instant motion.

In order to obtain collateral relief under section 2255 based on trial errors to which counsel made no contemporaneous objection, a convicted defendant must show "cause" for the double procedural default and "actual prejudice" resulting from the errors. *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584 (1982).

A. Ineffective assistance of counsel -- the cause requirement

The Spawrs implicitly rely on the same argument the Court considered in its original order, that the ineffectiveness of their counsel constitutes "cause" for their failure to object to the alleged errors. The courts agree that constitutionally ineffective assistance of counsel constitutes cause, but they diverge as to whether some lesser level of attorney negligence will suffice in some circumstances. Compare *Tsirizotakis v. LeFevre*, 736 F.2d 57 (2d Cir. 1984), *cert. denied*, 195 S. Ct. 216 (1984) (no "cause" shown where petitioner failed to show deprivation of Sixth Amendment right); with *Collins v. Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), *cert. denied*, 439 U.S. 1133, 99 S. Ct.

1057 (1979) (inadvertence of counsel may constitute "cause" for procedural default).

To show ineffective assistance of counsel, *Garrison v. McCarthy*, 653 F.2d 374 (9th Cir. 1981) holds that when counsel makes a tactical decision not to object to errors of the trial court, the convicted defendant must establish that his counsel's performance constituted a deprivation of his Sixth Amendment right. If instead the error is based on counsel's inadvertence or ignorance, "a lesser showing of incompetency of counsel should be sufficient for 'cause' " *Id.* at 378. However, the *Garrison* court did not address what lesser level of incompetence would be sufficient to constitute "cause" where counsel's failure to raise the issue in the original proceeding is unintentional.

To establish a Sixth Amendment deprivation, it must be shown that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). Counsel's conduct must fall below an objective standard of reasonableness. 466 U.S. at 688, 104 S. Ct. at 2064. Counsel's conduct must also be prejudicial, that is, it must be shown that "but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S. Ct. at 2068.

If counsel's errors were the result of inadvertence or ignorance, the Court must decide whether counsel's performance was so deficient as to justify raising these matters collaterally.

In either case, whether counsel's conduct is analyzed under the Sixth Amendment or the "inadvertence or ignorance" standard, the Court necessarily assesses the merits of the petition. If the challenge is meritless, no prejudice for the failure to raise it can result, and counsel's failure to do so, because of tactics, inadvertence or ignorance, cannot be viewed

as unreasonable or incompetent. If the challenge is meritorious, competent counsel would have made it, absent equally promising alternatives or countervailing considerations. The Court notes, as it did in the original order, that it is not enough to argue that the necessity of the petition itself demonstrates inadvertence or ignorance sufficient to constitute "cause." Whatever lesser degree of incompetence is necessary to constitute "cause" under the second standard, more must be shown than the mere necessity of the petition.

Defendants argue that their counsel's performance was incompetent at all points of the case -- pretrial, trial, and post-trial.

B. Failure to develop exculpatory expert testimony

Defendants first assert that they provided defense counsel Mr. William Dougherty with the names of twenty-four expert witnesses to obtain expert testimony that the device they exported was not on the Commodity Control List (List) of the Export Administration Act (Act) and had been freely exported since 1970. Defendants assert that a few days before trial, Dougherty falsely claimed that he had interviewed each of these experts and insisted that their testimony would not be helpful.

Second, defendants argue that their counsel interviewed only Dr. Peter Franken before trial and during trial neglected to adduce Dr. Franken's background as Chairman of the U.S. Air Force Adversary Group on Satellite Survivability from 1973-1983 and his testimony that the defendants' equipment was not and should not have been on the List, and in fact was in widespread use.

Third, Colonel Ted Saito, the Air Force officer in charge of approving transfer of laser mirror technology to foreign nations, conferred with Mr. Spawr and agreed to testify at the trial. When Colonel Saito did not appear at trial, Dougherty falsely stated that he had contacted him, but that he now refused

to testify. Colonel Saito has filed a declaration stating that he was never contacted by Dougherty and that his calls to Dougherty were not returned. Defendants assert that the testimony of both of these two was crucial to their defense that the device was not regulated by the Act. They point out that if the device is not on the List, then a license to export is not required and exportation without a license does not constitute a criminal violation.

It is not clear whether Mr. Dougherty made a tactical decision that the expert testimony would not be useful and therefore decided not to follow Mr. Spawr's apparent requests, or whether Mr. Dougherty simply neglected to investigate these witnesses and subsequently tried to cover himself by claiming that he had. In either case, the Court does not believe that its original conclusion should be disturbed. Again, the Court does not find that Mr. Dougherty's representation was performed in a manner so inadequate that defendants have shown "cause" to raise these issues collaterally.

Even if defendants were able to establish "cause," they have not suffered actual prejudice. The Court has already held that "the executive branch determines which items or information must be regulated to effectuate the many domestic and international policies enumerated in the Act." The Court believes that the expert testimony taken on the question whether the Spawrs' laser mirrors were in fact on the List was more than sufficient for the Court to make its determination. The government correctly notes that nothing in the declarations of Dr. Franken or Colonel Saito changes the basic principle that it is the function of the executive branch, not that of the proffered experts, to determine the licensability of commodities in general and the Spawrs' laser mirrors in particular. Whether the device is not on the List, or should be on the List, were not questions which went to jury. Consequently, the expert testimony of the Spawrs proffer here would have had no appreciable effect on the outcome of the case.

C. Prosecutorial misconduct

If sufficiently severe, prosecutorial misconduct may deny a defendant a fair trial and thereby justify either the dismissal of the indictment or the order of a new trial. *United States v. Samango*, 607 F.2d 877, 884-5 (9th Cir. 1979). Here, the Spawrs must not only show that the prosecutorial misconduct occurred, but also "cause" for not raising the issue at trial or on appeal and actual prejudice from the failure to do so. On appeal, the Spawrs alleged three instances of misconduct: a failure to return some exculpatory documentary evidence provided pursuant to government subpoenas, an impermissible interference with a defense witness, and a televised interview of the prosecutor where he generally discussed the case.

(a) Suppression of exculpatory evidence

Defendants now point to two additional alleged acts of prosecutorial misconduct involving suppression of exculpatory evidence. First, Mr. Wu, the Assistant U.S. Attorney who prosecuted the case, interviewed Professor Allen E. Hill as a prospective expert witness. He put Mr. Wu on notice that the only laser related items that were on the List were items that possess or can be adapted or redesigned and upscaled to possess weapons grade capability -- a capability the Spawrs claim their equipment does not possess. Defendants claim that Mr. Wu did not turn this information over to the defendants but instead called technical witnesses at trial whose testimony obfuscated the difference between "advance gas flow" technology which is on the List and the technology employed in the Spawrs' laser mirror. Second, defendants assert that Mr. Wu subpoenaed Dr. Franken who also stated that the Spawrs' laser mirror is not on the List, but Mr. Wu failed to turn over

this information to the defendants. Thus, defendants argue that in both instances, Mr. Wu suppressed exculpatory evidence.

Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), the suppression by the prosecution of exculpatory evidence violates due process of law where the evidence is material to guilt or punishment, regardless of the good faith or bad faith of the prosecution.

Even if the defendants could show "cause" for not having raised these grounds earlier on appeal with the other grounds for prosecutorial conduct, a showing the Court believes they fail to make, the Court finds that because the expert witness testimony of Professor Hill and Dr. Franken cannot be properly viewed as exculpatory evidence, the prosecutor's obligation under *Brady* was not triggered. Consequently, Mr. Wu's actions cannot be viewed as misconduct. This proposed expert testimony cannot be considered exculpatory because both of the experts' opinions go to the question of whether the Spawrs' laser mirrors are on the List. Defendants admit as much when they point to the opinions of these two experts and argue that the real issue in this case is whether the device was in fact on the List. As the Court has stated before, however, the executive branch, not the experts, determines whether a commodity is on the List. The issue is not one which goes to the jury; hence, further expert testimony would have been of little use to the defendants because the Court believes that it had more than adequate testimony before it to render its decision. Thus, it cannot be said that defendants have suffered any actual prejudice because this evidence was not before the Court. These grounds are insufficient for the relief defendants request.

(b) Intentional misrepresentation to the Court

Defendants assert that the prosecution intentionally submitted the wrong List to the Court, and the Court failed to

detect the deception and consequently relied on the wrong List in formulating the jury instructions. Specifically, defendants assert that the prosecution did not submit the correct List found at 15 C.F.R. 399.1, but a list known officially as "Interpretation 29," found at 15 C.F.R. 399.2. Interpretation 29 sets forth the "general industrial equipment" for which a validated license is required for export to Libya, Cuba, Kampuchea, North Korea and Vietnam.

After reviewing the transcript and the two lists that the defendants have submitted, Interpretation 29 and the correct List, it is the Court's recollection that the prosecution submitted both lists. Thus, while Interpretation 29 may have been extraneous material, the Court did have the correct List before it. Moreover, the correctness of the jury instructions was reviewable on appeal.

Like defendants' other allegations of prosecutorial misconduct, even if defendants could show "cause" for not having raised these grounds earlier, a showing they failed to make, they suffered no prejudice from the alleged misrepresentation. Dougherty's failure to object to Interpretation 29 cannot in any way be viewed as prejudicial. Finally, defendants have submitted no evidence which shows that the prosecution intended to mislead the Court. This ground is therefore insufficient for the relief defendants request.

D. Failure to file the Court's order timely.

Finally, defendants assert that Mr. Dougherty failed to file on time the Court's order allowing Mr. Spawr to serve his sentence in a halfway house rather than in a pentitentiary [sic]. As a result, the order was not honored and Mr. Spawr was incarcerated at Boron Federal Prison.

Mr. Dougherty's failure does not provide grounds under section 2255 for setting aside the defendants' sentences.

Dated: July 28, 1987

{Signature}
Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX D

United States Court of Appeals For the Ninth Circuit

United States of America,	)	No. 87-6272
Plaintiff-Appellee	)	
	)	DC Nos.
v.	)	CR-80-0789-WMB
	)	and
Spawr Optical Research, Inc.	)	CR-85-3193-WMB
Walter J. Spawr, and	)	
Frances Spawr,	)	
Defendants-Appellants	)	OPINION
	)	

BEFORE: PREGERSON, WIGGINS, and BRUNETTI, Circuit Judges

Judge Wiggins and Judge Brunetti have voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Pregerson has voted to grant the petition for rehearing and allow the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

TITLE 50, APPENDIX - WAR AND NATIONAL DEFENSE
§§ 2401 - 2413

EXPORT REGULATION
PUB. L. 91-184, DEC. 30, 1969, 83 STAT. 841

* * *

§ 2403. Authority to effectuate policy

* * *

(b) Presidential determinations; rules and regulations; allocation of export licenses; export decontrol, investigation; Presidential removal of unilateral export controls; priority to controls; report to President and Congress

(1) To effectuate the policies set forth in section 3 of this Act [section 2402 of this Appendix], the President may prohibit or curtail the exportation from the United States, its territories and possessions, of any articles, materials, or supplies, including technical data or any other information, except under such rules and regulations as he shall prescribe. To the extent necessary to achieve effective enforcement of this Act [sections 2401 to 2413 of this Appendix], these rules and regulations may apply to the financing, transporting, and other servicing of exports and the participation therein by any person. Rules and regulations may provide for denial of any request or application for authority to export articles, materials, or supplies, including technical data, or any other information, from the United States, its territories and possessions, to any nation or

combination of nations threatening the national security of the United States if the President determines that their export would prove detrimental to the national security of the United States, regardless of their availability from nations other than any nation or combination of nations threatening the national security of the United States, but whenever export licenses are required on the ground that considerations of national security override considerations of foreign availability, the reasons for so doing shall be reported to the Congress in the quarterly report following the decision to require such licenses on that ground to the extent considerations of national security and foreign policy permit.

* * *

(2) . . . Notwithstanding the provisions of paragraph (1), the President shall remove unilateral export controls on the export from the United States of articles, materials, or supplies, including technical data or other information, which he determines are available without restriction from sources outside the United States in significant quantities and comparable in quality to those produced in the United States, except that any such control may remain in effect if the President determines that adequate evidence has been presented to him demonstrating that the absence of such a control would prove detrimental to the national security of the United States. The nature of such evidence shall be included in the special report required by paragraph (4).

* * *

(d) Necessity of authorization or permission to export

Nothing in this Act [sections 2401 to 2413 of this Appendix] or the rules or regulations hereunder shall be

construed to require authority or permission to export, except where required by the President to effect the policies set forth in section 3 of this Act [section 2402 of this Appendix].

* * *

§ 2405. Violations and Penalties.

(a) Generally; subsequent offenses

Except as provided in subsection (b) of this section, whoever knowingly violates any provision of this Act [sections 2401 to 2413 of this Appendix] or any other regulation, order, or license issued thereunder shall be fined not more than $10,000 or imprisoned not more than one year, or both. For a second or subsequent offense, the offender shall be fined not more than three times the value of the exports involved or $20,000, whichever is greater, or imprisoned not more than five years, or both.

(b) Export to Communist-dominated nations; penalties

Whoever willfully exports anything contrary to any provision of this Act [sections 2401 to 2413 of this Appendix] or any regulation, order or license issued thereunder, with knowledge that such exports will be used for the benefit of any Communist-dominated nation, shall be fined not more than five times the value of the exports involved or $20,000, whichever is greater, or imprisoned not more than five years, or both.

* * *

§ 2407. Exemption from administrative procedure and judicial review provisions.

The functions exercised under this Act [sections 2401 to 2413 of this Appendix] are excluded from the operation of sections 551, 553-559, and 701-706, of title 5 United States Code.

* * *

APPENDIX F

15 C.F.R. 399.1

Commodity Control List-399.1 7299(23) - 7299(27) CCL-61
|| 611 || QSTVWYZ || 500 || 500 || 0 || R

. . . 7299(25)A Lasers, n.e.c., except (a) argon, krypton, and dye lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 20 watts; (b) helium-cadmium and nitrogen lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 120 watts; (c) helium-neon lasers with an output wavelength shorter than 0.8 microns; (d) ruby-lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) an energy output not exceeding 2 joules per pulse; (e) CO_2 lasers with all of the following characteristics: (i) an output wavelength in the range of 9 to 11 microns, (ii) a pulsed output not exceeding 2 joules per pulse and an average or continuous wave maximum rated output power not exceeding 1,200 watts, and (iii) in which the beam, electrical excitation, and gas flow, if any, are in the same direction, or those using the TEA (transverse excitation atmospheric) principle for excitation; and (f) Nd:YAG and Nd: Glass lasers with both of the following characteristics: (i) an output wavelength of 1.06 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 10 watts; and specially designed parts and accessories, n.e.c. (Specify by name and model number.)

APPENDIX G

15 C.F.R. 399.2

Interpretation 29: General Industrial Equipment

The commodities listed below require a validated license for export to **Country Groups S and Z**.

General industrial equipment and parts therefor, n.e.s. *the following only:*

Abrasive circulators
Abrasive-coating
Accumulators, hydraulic
Aerators
Agricultural machines and appliances, n.e.s.
Airconditioning machines, n.e.s.
Air or gas compressors, n.e.s.[1]
Air heaters, portable, fuel, fired, n.e.s.
Armature winding
Assembling fixtures, production, *except for production of military equipment*
Basket-making
Battery-making
Binoculars and telescopes, including astronomical telescopes, n.e.s.
Bituminous pavers, finishers, and spreaders
Blenders

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1 A validated license is required for this equipment and any equipment utilized in the exploration for, production of, transmission of, or transportation of petroleum or natural gas, or refining of petroleum or natural gas for energy usage, *excluding petrochemical feedstock* , as well as specially designed parts and accessories therefor, to the USSR, Afghanistan, Estonia, Latvia, and Lithuania.

Boiler room specialty tools
Bottling, canning, cleaning, dishwashing, filling, packaging, and sealing machines, n.e.s.
Broom-making
Brush-making
Button covering
Button-making
Cable-making, n.e.s.
Cable spinning
Calendering machines and similar rolling machines, n.e.s.
Candle making
Carpet sweepers, hand
Cattle stunners
Centrifuges, filtering, and purifying machines for liquids, air, and gases, n.e.s.
Cigarette and cigar making and other tobacco processing
Clay guns
Cleaners, ultrasonic, n.e.s.
Cleaning equipment, n.e.s., for magnetic tape and other recording media
Cleaning units, sack
Coil winding for electrical components
Coiling, flexible casing or flexible tube
Color mixing and dispensing
Concrete pavers, finishers, and spreaders
Coolers, evaporative type
Cordage making
Cranes, n.e.s., nonmilitary
Creosoting, wood products
Dehumidifiers, non-freezing
Diving bells or suits, mechanically equipped
Drawing, marking out, calculating, drafting, measuring, and checking appliances and machines, mechanical, nonelectric, or nonelectronic, n.e.s.
Environmental chambers, n.e.s.
Excavating, leveling, mining, oilwell drilling, well drilling, construction, and maintenance equipment, n.e.s.[1]
Fans and blowers, n.e.s.
Fermentors
Filament winding, n.e.s.
Filters, ferro-magnetic

Flame arrestors
Floor finishers, sanders, scrubbers, and surfacers, industrial type
Fluorescent disposal units
Food processing machines
Freeze dryers
Fumigation chambers
Fur-blowing
Fur-treating
Garbage grinders, commercial and industrial
Gas operated welding, cutting, brazing, and surface tempering machines and appliances, n.e.s.
Gas or liquid supply meters, n.e.s.[1]
Gas turbine engines, n.e.s.[1]
Glass working machines, n.e.s.
Grinders and crushers, laboratory
Hand tools, n.e.s.
Hat-blocking and hat-making
Homogenizers, laboratory
Humidifiers, air
Ice breakers
Ice-crusher slingers
Ice saw and drill, combination type, engine driven
Impregnators, non-centrifugal
Incinerators, commercial and industrial
Incubator shakers
Industrial and laboratory nonelectric furnaces and ovens, n.e.s.
Internal combustion engines, reciprocating
Internal pneumatic line-up clamps for welding transmission line pipe[1]
Lifting, loading, and conveying machines and equipment, n.e.s.
Line-travelling coating and wrapping for pipes and tubes[1]
Linoleum-making
Lubricating
Machinery and equipment, n.e.s.. for the manufacturing and assembling of electronic components, n.e.s.
Machines, n.e.s., for processing and working wood, cork, bone, ebonite, glass, plastics, cement products, stone, and similar mineral materials

Machines, n.e.s., for treatment of a material involving a change in temperature
Mattress filling
Measureograph for measuring cloth
Mechanical appliances for testing physical properties of industrial materials, n.e.s.
Mechanical instuments, n.e.s., for measurement, transmission, or control of temperature, pressure, or other variables of liquids or gases[1]
Mechanical watches and clocks
Metal finishing, chemical
Metallurgical, mill, and foundry equipment, n.e.s.
Metering and mixing, n.e.s.[1]
Microscopes, except electron and proton, n.e.s.
Nutters
Office machines, n.e.s.
Oil field wire line and downhole equipment[2]
Optical elements and appliances, n.e.s.
Paint markers and mixers
Paper making machinery
Photoprinters, n.e.s.
Pin ticketing (tag-to-product applying)
Pipe line cleaning[1]
Plastic working, n.e.s.
Power sweepers
Power transmission equipment, n.e.s.
Presses, n.e.s.
Printed circuit board laminating presses and lead masters
Printing machines, n.e.s.
Proportioning, mixing, and dispensing resins
Pulsating dampeners
Pumps for liquids, n.e.s.
Reels, hose and cable, power operated
Refractory injection guns
Refrigerant charging apparatus, automatic
Refrigeration equipment, n.e.s.
Ribbon coiling
Roller coasters, n.e.s.
Rope-making
Rubber extruding processing

Rubber products manufacturing, n.e.s.
Searchlights and spotlights
Shaking machines, laboratory
Shock absorbers, mechanical or hydraulic
Shoelace tipping
Smoke generators, *except military*
Snow throwers, self-propelled
Soldering, automotive wave and reflow type
Sonic sewing machines
Special purpose industrial vehicles, n.e.s., nonmilitary, *e.g.*, cement mixers, street and airfield cleaning, asphalt mixers, seismograph thumper mounted trucks, mine shuttle vehicles, trucks, with derrick assembly and similar equipment for drilling, mounted integral to truck frame, etc.
Spinning
Spraying machines, n.e.s.
Steam cleaning
Steam generating power boilers, engines, and turbines, n.e.s.
Stone products manufacturing
Surgical dressing making
Surveying, hydrographic, meteorological, hydrological, and geophysical instruments, n.e.s.
Sweepers, road
Tank-cleaning
Tanks with agitators
Taping machines for covering wire and cable
Textile and leather working machines, n.e.s.
Tire building, recapping, and repairing
Toothbrush manufacturing
Track press for repairing tractor crawlers or tracks
Transfer machines, nonmetalworking, *except for assembling, gauging, or packaging of munitions*
Tube cleaners
Tube expanders, maintenance type
Typemaking and typesetting machines, n.e.s.
Vacuum cleaners
Valves, plumbing fixtures, cocks, and taps, n.e.s.
Vegetable oil mill
Vibrating paper joggers
Vibrators, hydraulic

Wall-board plaster core
Watch-cleaning
Water bath shakers
Watercraft controls, nonelectric, *except military* (for example, steering equipment excluding rudders and remote controls)
Water turbines, water engines, wind, and hot air engines
Wax molding
Waxing industrial
Weed cutting, underwater
Weighing machines
Welders, plastic, ultrasonic
Welding machines, n.e.s.
Welding rod brushing and feeders
Wheel tractors, including garden, log skidders, and contractors earthmoving types, n.e.s.
Wind tunnels, subsonic
Winding, n.e.s.
Windshield wipers, nonelectric
Wire braiding, wire rope-making, wire stitching, and measuring
stripping, cutting, and terminal attaching
Zipper manufacturing

COUNTRY GROUPS

15 C.F.R. § 370 Supplement No. 1

For export control purposes, foreign countries are separated into eight country groups designated by the symbols "P", "Q", "S", "T", "V", "W", "Y", and "Z". Listed below are the countries included in each country group. Canada is not included in any country group and will be referred to by name throughout the Export Administration Regulations.

* * *

Country Group S

Libya

* * *

Country Group Z

Cuba
Kampuchea
North Korea
Vietnam

APPENDIX H

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D. C. 20230

July 2, 1987

Mr. Steven R. Perles
1320 9th Street. N. W.
Suite 500
Washington, D. C. 20036

Dear Mr. Perles:

This letter is in confirmation of your telephone conversation of July 1, 1987 with Ms. Toni Jackson regarding the March 9, 1987 Freedom of Information Act (FOIA) request submitted by your client Walter J. Spawr.

On June 30, 1987, the Office of Export Enforcement forwarded to this office documents it located in response to Mr. Spawr's request. These documents are classified and must undergo a declassification review to determine what, if any, information may be released to Mr. Spawr. We have initiated this process, which will involve review within the Department of Commerce, as well as consultation with other agencies.

The documents relate to export license application 209559 submitted by Spawr Optical Research, Inc. on May 14, 1976. The application was for the export of fourteen copper laser mirrors, valued at $31,842.50 to the Physics Institute, University,

Moscow, through the Advisory Committee on Export Policy (ACEP) operating Committee on August 30, 1976 with a preliminary recommendation by the Commerce licensing officer. The Operating Committee recommend denial of the applicant October 4, 1976.

I hope the above information is helpful to you. We will pursue the review of these documents as quickly as possible.

Sincerely,

Daniel O. Hill
Director
Program Review Staff
Export Administration

FOI 1987-116

OC DOCUMENT NO. 5653

Value:	$30,842.50
End Use:	To study the interaction of light and particle beams with gases of high temperature.
Export Control Status:	IL-1522; prior COCOM clearance is a US responsibility; CCL No. 8611(1)A.

DESCRIPTION AND USES

The mirrors are manufactured from high purity copper and are useable over a broad wavelength spectrum. The predominant use is in the laser field, and particularly with CO_2 lasers. They are capable of a damage threshold of greater than 120 kilowatts/cm2 and are used primarily with CO_2 lasers with CW power levels of approximately 200 watts. They can and are being used with CO_2 lasers with power levels exceeding 1200 watts. It is not possible without knowing the specifics about the laser with which these mirrors are utilized, to determine the maximum level at which they can operate.

These mirrors are being used in commercial and military applications. Some commercial applications include welding and pollution studies. General Motors is utilizing similar mirrors in conjunction with a laser to case harden engine cylinder walls to achieve longer lifetimes. ERDA is utilizing these mirrors in their laser isotape separation and laser fusion programs (the intended end use in this case). DOD is also utilizing these mirrors in some classified high energy programs.

LICENSING HISTORY

The reference OC document concerned laser optics designed for use with CO_2 lasers operating below 1000 watts. The mirrors in this case are capable of operating at levels exceeding 1200 watts. The referenced case was approved for demonstration in the USSR.

FOREIGN AVAILABILITY

Comparable laser mirrors are available from Mirror Technique of Switzerland, a division of Laser Techneque of Switzerland.

EXPORT CONTROL STATUS

These mirrors are covered under IL-1522 since they are components for lasers which have not been specifically excluded. Although they are not specially designed for lasers and are used with other light sources, their predominant usage is with CO_2 lasers and , therefore, covered by IL-15222.

RECOMMENDATION

Commerce recommends approval of this case based upon the appropriate non-strategic end use and non-COCOM foreign availability. COCOM approval will be secured prior to licensing.

APPENDIX I

DECLARATION
in the matter of
United States v. Spawr, et.al., CR 80-789-WMB
CV 85-3193-WMB

Albuquerque, New Mexico

Alan E. Hill declares as follows:

1. I am President and Chief Scientist of Plasmatronics. I append hereto a summary of my experience, accomplishments and publications, a resume which was given to Assistant U.S. Attorney Theodore Wu, the prosecuting attorney in the above noted case. On the basis of this resume, Mr. Wu subpoenaed me to be an expert witness for the prosecution in the subject case.
2. It is my understanding that Walter Spawr, Frances Spawr, and Spawr Optical Research, Inc. were convicted of violating Commodity Control List regulation 7299 (25), attached hereto.
3. After being subpoenaed and scheduled to testify as a prosecution expert witness at this trial, and prior to the conduct of the trial, I conferred with prosecutor Wu at a series of meetings in Los Angeles. At the first meeting, Mr. Wu showed me a cross-section of a weapons grade double pass molybdenum laser mirror which he stated was the type of mirror allegedly exported by defendant Walter Spawr. I later learned that this was not the type of mirror which SPAWR had been alleged to have exported. I informed Mr. Wu that I was completely familiar with the equipment Mr. Spawr regularly manufactured and was accused of illegally exporting, and that the Spawr and similar mirrors were in widespread use.

4. I also told Mr. Wu that, while employed as a Chief Scientist of the High Energy Laser Development Branch at the U.S. Air Force Weapons Laboratory, the Department of Commerce solicited from me the criteria upon which I would list laser equipment on the Commodity Control List. The regulation in question, attached hereto, was identical to my recommendation. I explained to Mr. Wu that the only laser related items that were listed on the regulation in question on the Commodity Control List were items that have, or can be adapted to have, or can be redesigned and up-scaled to have, weapons grade capability. I also explained that the SPAWR equipment did not and could not have such capability.

5. The regulation in question restricting export would apply only to the so called "advance gas flow" technology used to generate a laser beam, but not specifically to the mirrors manufactured and exported by Walter Spawr -- which is entirely different.

6. I further told him that even if the generic type of mirrors manufactured and exported by Walter Spawr were regulated, the Spawr equipment did not meet the standard for inclusion on the Commodity Control List that I recommended, because the SPAWR equipment was not an advanced technology laser mirror capable of reflecting a laser beam, at the high power levels required for possible laser weapons applications, without so distorting the beam as to render it useless for military applications and that the items in question did not have, nor could they be adapted to have, or be redesigned and up-scaled to have, weapons grade capability.

7. I waited outside the courtroom several hours, but was never called to testify, and I was eventually excused.

I solemnly declare and affirm under penalty of perjury that the information in the foregoing declaration is true and correct.

{Signature}
Alan E. Hill

Commodity Control List-399.1 7299(23) - 7299(27)
CCL-59

. . . 7299(25)A Lasers, n.e.c., except (a) argon, krypton, ...611 QSTVWYZ 500 500 0 R and dye lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 20 watts; (b) helium-cadmium and nitrogen lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 120 watts; (c) helium-neon lasers with an output wavelength shorter than 0.8 microns; (d) ruby-lasers with both of the following characteristics: (i) an output wavelength shorter than 0.8 microns, and (ii) an energy output not exceeding two joules per pulse; (e) CO_2 lasers with all of the following characteristics: (i) an output wavelength in the range of nine to eleven microns, (ii) a pulsed output not exceeding two joules per pulse and an average or continuous wave maximum rated output power not exceeding those using the TEA (transverse excitation atmospheric) principle for excitation; and (f) Nd:YAG and Nd:Glass lasers with both of the following characteristics: (i) an output wavelength of 1.06 microns, and (ii) a pulsed output not exceeding 0.5 joule per pulse and an average or continuous wave maximum rated output power not exceeding 10 watts; and specially designed parts and accessories, n.e.c. (specify by name and model number.)

APPENDIX J

136 CONGRESSIONAL RECORD H3281 (Daily ed. June 6, 1990)

* * *

Mr. HORTON. Mr. Chairman, I rise along with the gentleman from California [Mr. MCCANDLESS] to engage the gentleman from Connecticut [Mr. GEJDENSON] and the gentleman from Wisconsin [Mr. ROTH] in a colloquy.

Mr. Chairman, as you know I am concerned that, since the decision of the U.S. Court of Appeals for the Ninth Circuit in *Spawr Optical Research, Inc.* v. *United States*, 864 F.2d 1467 (1988), there is no longer a clear nationwide rule governing the burden of proof the U.S. Government must prove in criminal prosecutions under the Export Administration Act. I understand that you have included an amendment in H.R. 4653 which would make it completely clear that the U.S. Government is required by law to prove that the commodity that was exported was, in fact, listed by the Secretary of Commerce on the Commodity Control List at the time of export. Is that correct?

Mr. GEJDENSON. Yes. As we stated at page 17 of the House report on H.R. 4653:

The committee believes that it is for the Government to prove that the item exported was on the commodity control list at the time of export.

Mr. HORTON. Mr. Chairman, am I correct that the Export Administration Act requires the Government to prove beyond a reasonable doubt that:

First, the commodity in question has, in fact, been listed by the Secretary of the commodity control list -- thus creating the legal requirement to obtain a validated license prior to export;

Second, the commodity was exported without obtaining such a license; and

Third, that the exporter intended to export the commodity?

Mr. GEJDENSON. Yes. That is a correct statement of what the act requires. This amendment is intended to clarify what the Export Administration Act has required since its original enactment.

Mr. HORTON. Mr. Chairman, I would ask the ranking member, the gentleman from Wisconsin [Mr. ROTH], if he agrees with those responses?

Mr. ROTH. Mr. Chairman, I agree with the gentleman from Connecticut [Mr. GEJDENSON].

Mr. McCANDLESS. Mr. Chairman, will the gentleman from New York [Mr. HORTON] yield?

Mr. HORTON. I yield to the gentleman from California.

Mr. McCANDLESS. The individuals mentioned by the gentleman from New York, the Spawrs, are constituents of mine, and I have closely followed their cases.

The legislation before us will serve to clarify a number of issues, including whether or not the Government is required to prove that a exported commodity was in fact listed by the Secretary of Commerce on the commodity control list at the time it was exported.

It is my understanding that such was Congress' intent to require such proof, but the Ninth Circuit Court of Appeals ruled to the contrary in Spawr Optical Research versus United States.

My question is this. Is the chairman satisfied that H.R. 4653 will make it clear that it was Congress' intent that, in prosecutions under the act, the Government is required to prove that an exported commodity was on the commodity control list at the time it was exported?

Mr. GEJDENSON. Yes. The committee report on H.R. 4653 makes it explicitly clear that it was and is Congress' intent to require the Government to provide in criminal prosecutions under the act, that the commodity in question was in fact listed on the commodity control list. If a commodity was not listed, it would not be a crime under the act to export it without a license.

APPENDIX K

137 CONGRESSIONAL RECORD H8728
(Daily ed. October 30, 1991)

* * *

Mr. HORTON. . . .

Mr. Chairman, I would like to engage the chairman of the subcommittee, the gentleman from Connecticut [Mr. GEJDENSON], in a colloquy.

Mr. Chairman, on June 6, 1990 we discussed the problem that was created with respect to the Export Administration Act by a decision of the U.S. Court of Appeals for the Ninth Circuit in *Spawr Optical Research, Inc.* v. *United States*, 864 F.2d 1467 (1988). The problem is that since this judicial decision there is no longer a clear nationwide rule governing the burden of proof the U.S. Government must sustain in criminal prosecutions under the Export Administration Act. In that colloquy on June 6, 1990, it was agreed that the court of appeals for the ninth circuit had misapprehended the Export Administration Act requirement that the U.S. Government must prove that the exported item was, in fact, listed by the Secretary of Commerce on the commodity control list, thus creating the legal requirement to obtain a validated license prior to export.

In your position as chairman of the Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs, is this your understanding of the law.

Mr. GEJDENSON. If the gentleman will yield, that is correct.

Mr. McCANDLESS. Mr. Chairman, will the gentleman yield?

Mr. HORTON. I yield to the gentleman from California.

Mr. McCANDLESS. I would like to add that Federal courts in the first and eighth circuits have issued decisions which enunciate the legally correct interpretation of the Export Administration Act. For example, in *United States* v. *Gregg*, 829 F.2d 1430, 1437 (8th Cir. 1987) the eighth circuit clearly stated "when the case gets to court, all the government needs to prove is that the item exported appears on the munitions list or the commodity control list, as the case may be, that the defendant knowingly and willfully exported it, with the necessary intent and knowledge, and without the appropriate license." The same rule applies in the first circuit, *United States* v. *Moller-Butcher*, 560 F.Supp. 552-553 (D. Mass. 1983).

In an earlier colloquy, Chairman GEJDENSON made it explicitly clear that these cases have properly interpreted the Export Administration Act. He stated that the report on H.R. 4653 makes it explicitly clear that it was and is Congress' intent to require the Government to [prove] in criminal prosecutions under that act, that the commodity in question was in fact listed on the commodity control list. If a commodity was not listed, it would not be a crime under the act to export it without a license. Mr. Chairman, is this still the gentleman's understanding of the law?

Mr. GEJDENSON. Mr. Chairman, if the gentleman from New York will yield; yes it is.

Mr. HORTON. Finally, as I did in our earlier colloquy on this issue I would like to note that the ninth circuit has issued yet another decision which aggravates the problem. On September 14, 1990, the Court of Appeals for the Ninth Circuit in a case styled United States v. Mandel, reaffirmed the Spawr decision as the controlling precedent governing the burden of proof the U.S Government must prove in criminal prosecutions under the Export Administration Act.

Under the Spawr decision, the ninth circuit held that the U.S. Government need not prove beyond a reasonable doubt that the commodity in issue had been listed on the commodity control list

and therefore was subject to the export licensing requirement. Mandel reaffirms the Spawr holding and explicitly reiterates that judges and juries must accept without question the U.S. Government's allegation that the Secretary of Commerce had listed the commodity on the commodity control list prior to the export of the commodity.

We cannot continue to allow the proliferation of the Spawr decision to wreak havoc on our export trade and the free exchange of technical and scientific ideas. It is clear that the lack of a uniform national standard concerning the burden of proof in criminal prosecutions under the Export Administration Act adversely impacts the dissemination of scientific information, creates a chilling effect on the free exchange of ideas, and impairs our export trade. I have been contacted by scientists and exporters urge Congress to clarify this matter and to reestablish a uniform nationwide rule. I reiterate that the Optical Society of America believes that the Spawr decision has created an intolerable situation and urges Congress to establish a uniform national rule, namely, the Gregg rule, and to repudiate the misinterpretation of the law by the ninth circuit in the Spawr decision.

Subsequent to our colloquy in this matter, Congress passed legislation which would have extended the Export Administration Act with amendments not germane to this problem. The President vetoed this legislation for reasons that, again, are not germane to this problem. The status quo ante under the Export Administration Act is now maintained by Executive order.

Whether the Export Administration Act is kept in force by Executive order or extended legislatively, the problem remains that the ninth circuit has misapprehended that law. In the interval since our earlier colloquy it has come to my attention that yet another case has been decided by a Federal district court in the ninth circuit in which the Spawr case and the Mandel case are treated as the law of the circuit. I refer here to *United States* v. *Adelkadar Helmy* at 712 F. Supp. 1423 (E.D. Calif. 1989). Does

the gentleman from Connecticut join us in the desire to see the ninth circuit remedy the problem created by the Spawr case?

Mr. GEJDENSON. Mr. Chairman, I join the gentleman from New York and the gentleman from California in calling on the ninth circuit to reverse itself and thereby join in the uniform national rule established by the Gregg and Moller-Butcher cases which correctly interpret the intent of Congress.

* * *

APPENDIX L

136 CONGRESSIONAL RECORD H12778 (Daily ed. October 26, 1990)

* * *

Mr. HORTON. Mr. Speaker, I rise along with the gentleman from California [Mr. MCCANDLESS] to engage the gentleman from Florida [Mr. FASCELL] and the gentleman from Wisconsin [Mr. ROTH] in a colloquy.

Mr. Speaker, may I ask the chairman, as I indicated in a previous colloquy on June 6, 1990, I am concerned that since the decision of the U.S Court of Appeals for the Ninth Circuit in *Spawr Optical Research, Inc.* v. *United States*, 864 F.2d 1467 (1988), there is no longer a clear nationwide rule governing the burden of proof the U.S Government must prove beyond a reasonable doubt in criminal prosecutions under the Export Administration Act.

In the previous colloquy, may I say to the chairman, both the chairman and the ranking member, the gentleman from Wisconsin [Mr. ROTH] agreed that since its enactment the Export Administration Act has required the Government to prove beyond a reasonable doubt in such prosecutions that:

First, the commodity in question had been listed by the Secretary of Commerce on the Commodity Control List prior to export -- thus creating the legal requirement to obtain a validated license to export;

Second, that the commodity was exported without obtaining such a license; and

Third, that the exporter intended to export the commodity.

This is the established nationwide rule articulated in *United States* v. *Gregg*, 629 F2d 1430, 1437 (8th Cir. 1987) and followed in other circuits until the Spawr decision in 1988.

In the period since our colloquy, I say to the Ninth Circuit has issued yet another decision which aggravates the problem. On September 14, 1990, the Court of Appeals for the Ninth Circuit in a case styled United States versus Mandel, reaffirmed the Spawr decision as the controlling precedent governing the burden of proof the U.S. Government must prove in criminal prosecutions under the Export Administration Act.

Under the Spawr decision the Ninth Circuit held that the U.S. Government need not prove beyond a reasonable doubt that the commodity in issue had been listed on the commodity control list and therefore was subject to the export licensing requirement. Mandel reaffirms the Spawr holding and explicitly reiterates that judges, and juries must accept without question the U.S Government's allegation that the Secretary of Commerce had listed the commodity on the Commodity Control List prior to the export of the commodity.

Mr. Speaker, I say to the chairman, the proliferation of the Spawr decision is beginning to produce devastating effects on our export trade and the free exchange of technical and scientific ideas. I have letters from well-known scientists and scientific societies and important exporters who assert that this lack of a uniform national standard concerning the burden of proof in criminal prosecutions under the Export Administration Act adversely impacts the disseminating of scientific ideas, creates a chilling effect on he free exchange or technical information and ideas, and impairs our export trade. All of these scientists and exporters urge Congress in the reauthorization of the Export Administration Act to clarify this matter and to reestablish a uniform nationwide rule. To cite but one example, the Optical Society of America, the largest society in the world devoted to the scientific and technological applications of light, publishes five journals throughout the world dealing with advanced technical subjects and conducts numerous international conferences. The Optical Society believes that the Spawr decision has created an intolerable situation and urges Congress to establish a uniform

national rule, namely the Gregg rule, and to repudiate the misinterpretation of the law by the Ninth Circuit in the Spawr decision. I say to the chairman, I believe there is complete agreement in both Houses that there must be a clear, uniform national rule and that it is up to Congress to clarify the situation.

Mr. Speaker, I would ask the chairman, now that the conference between the House and Senate on the reauthorization of the Export Administration is concluded, what is the status of the problem?

* * *